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Supreme Court, U.S
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In The
Supreme Court of the United States

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FRED URANGA,

Petitioner,

v.

FEDERATED PUBLICATIONS, INC.,
dba The Idaho Statesman,

Respondent.

◆

On Petition For A Writ Of Certiorari
To The Supreme Court Of The State Of Idaho

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PETITION FOR A WRIT OF CERTIORARI

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JOHN L. RUNFT
Attorney at Law
1020 W. Main Street, Suite 370
Boise, ID 83702
Phone: (208) 333-8506
Fax: (208) 343-3246
Email: jlrunft@qwest.net

Attorney for Petitioner

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

124 pp

QUESTIONS PRESENTED

Whether the privilege of the press under the First and Fourteenth Amendments to the United States Constitution to publish matters of public record is absolute.

Whether the newsworthiness doctrine is applicable to the press's privilege to publish the public record, in situations of obvious, extreme violation of privacy, in which no public interest in the particular disclosure exists, when the disclosure is readily separable or redactable from the publication, and when the press has knowledge (scienter) of the foregoing factors.

LIST OF PARTIES

Petitioner, Fred Uranga, was Plaintiff in the Fourth District Court of the State of Idaho, Appellant before the Idaho Court of Appeals, and Appellant before the Idaho Supreme Court.

Federated Publications, Inc., dba The Idaho Statesman, was the Defendant in the Idaho Fourth District Court, Appellee before the Idaho Court of Appeals, and Appellant before the Idaho Supreme Court.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Fred Uranga, respectfully requests that a writ of certiorari be issued to review the final opinion and order of the Idaho Supreme Court entered on February 14, 2003 in the case of *Fred Uranga v. Federated Publications, Inc., d/b/a the Idaho Statesman*, Docket No. 27118, and made final by that Court's order of Remittitur entered on April 14, 2003. The Opinion and Order is reproduced in Appendix ("App.") "A," at page 1. The Remittitur is reproduced in App. "D," at page 63.

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OPINIONS BELOW

On February 14, 2003, the Idaho Supreme Court set aside its prior decision on rehearing and issued an opinion and order affirming the judgment of the Idaho Fourth Judicial District Court, ___Idaho____, ____P.3d____ (2003) (Opinion No.17, 03.5 ISCR 197 Idaho (2003)) (App. "A," page 1).

This decision on rehearing set aside the Idaho Supreme Court's initial opinion and order (unpublished) entered on June 21, 2001 (Opinion No. 52, 01.15 ISCR 583, Idaho (2001)) (App. "B," page 16), which reversed the judgment of the Idaho Fourth District Court and set aside on review the opinion of the Idaho Court Of Appeals.

The Idaho Court of Appeals had entered an opinion and order (unpublished) on August 2, 2000 (Opinion No. 52, 00.17 ICAR 634, Idaho (2000)) (App. "B," page 40), affirming the judgment of the Idaho Fourth District Court.

The Idaho Fourth District Court entered its order on October 20, 1998, granting summary judgment in favor of

Federated Publications, Inc., d/b/a the Idaho Statesman ("Statesman") and dismissing Appellant, Fred Uranga's ("Uranga") claims for invasion of privacy and reckless infliction of emotional distress arising out of an article published by the Statesman containing a photographic representation of a forty-year-old hearsay statement from a court file accusing Uranga of homosexual conduct.

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STATEMENT OF JURISDICTION

The judgment of the Idaho Supreme Court became final on April 14, 2003, upon entry on that date of its order denying Uranga's petition for rehearing (App. "C," page 62) and its order of Remittitur (App. "D," page 63). Pursuant to Supreme Court Rule 13.3, this Petition is timely filed within 90 days of entry of final judgment. Pursuant to 28 U.S.C. § 1257(a), this Court has jurisdiction to review the final order of the Idaho Supreme Court affirming the judgment of the Idaho Fourth District Court.

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CONSTITUTIONAL PROVISIONS INVOLVED

First Amendment to the United States Constitution:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of people to peaceably assemble, and to petition the Government for a redress of grievances.

Fourteenth Amendment, Section 1, to the United States Constitution:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

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STATEMENT OF THE CASE

On Sunday, October 15, 1995, Respondent, the Idaho Statesman ("Statesman"), the largest newspaper in the State of Idaho, published a front page story entitled "The Boys Most Likely" (hereinafter referred to as "the Article") (App. 64, 69) concerning events that occurred in Boise in 1955 and 1956 as the result of an investigation into allegations that adult homosexual men were propositioning teenage boys at the YMCA. The resulting investigation involved approximately 1,500 witness interrogations, 16 arrests, and convictions of certain individuals. The events became known as the "Boys of Boise" scandal.

The Article in the Statesman centered upon Frank Jones, the son of a Boise City Councilman, who had been accepted by the United States Military Academy at West Point. The Article recounted the sensational story of the impact of these investigations on Frank Jones. As a consequence of the investigations, Frank Jones was kicked out of West Point, and he eventually committed suicide. According to the Article, six months after Frank entered West Point, a man named Melvin Dir was charged with a felony for allegedly performing oral sex upon Frank two years earlier. The Article contained an unredacted photographic representation of a sworn statement, by Melvin Dir ("Dir Statement") dated January 7, 1956, alleging that Dir had had a gay liaison with Frank Jones and that Jones had told him about "gay affairs that he (Frank) had had with (a classmate) and his cousin Fred Uranga." (App. 67, 86). The Statesman did not mention Uranga's name in the body of the Article, but instead, when referring to that portion of the Dir Statement in the text of the Article, redacted Uranga's name and replaced it with a blank line. (App. 66, 78).

The Dir Statement was filed with the Clerk of the Idaho Fourth District Court in Case No. 2203 and remains there today. In doing research for the Article, a reporter found the original, handwritten Dir Statement in a court file related to Dir's prosecution. Dir was ultimately convicted of an infamous crime against nature. Uranga was not involved in the investigation or charged with any crime in connection with Boys of Boise investigation.

On October 22, 1995, one week after the Article appeared, the Statesman published an editorial responding to public criticism of the Article. (App. 68, 88). In the editorial the Statesman admitted cognizance of the emotional distress caused by the publication of the Article and the resulting "understandable anguish we caused this family" and the lingering "desperate pain of those accused, or simply rumored about. . . . " (*Id.*).

Two weeks after the publication of the Article, Uranga wrote a letter to the Statesman expressly denying the allegations in the Dir Statement and requesting that the newspaper retract the one sentence of the Dir Statement that named him, claiming that the statement was libelous and invaded his privacy. The Statesman denied his request, but offered to publish Uranga's written response in a "Speakers Corner" feature to appear on the editorial page, or, alternatively, to publish an explanation for the inclusion of the Dir Statement.

On October 14, 1997, Uranga filed a complaint against the Statesman in the Idaho Fourth District Court alleging claims for invasion of privacy and intentional and/or reckless infliction of emotional distress. The Statesman filed an answer asserting affirmative defenses, including the fair reporting privilege and an absolute privilege to publish information in the public record under the First and Fourteenth Amendments to the United States Constitution. Following discovery by both parties, the Statesman moved for summary judgment. After argument, the District Court orally granted the Statesman's motion on both grounds relying on United States Supreme Court's decision in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975). A written order granting summary judgment and dismissing the complaint with prejudice was issued on October 20, 1998.

Uranga timely filed a notice of appeal. On appeal Uranga narrowed his claims for violation of his privacy rights to two causes of action (in addition to his claim for intentional or reckless infliction of emotional distress): (1) invasion of privacy by intrusion, and (2) invasion of privacy by publication of private facts. The appeal was assigned to the Idaho Court of Appeals which, after briefing and oral argument, upheld the District Court's grant of summary judgment in an opinion filed on August 2, 2000 (Opinion No. 52/00, 00.17 ICAR 634). (App. 40). The Court of Appeals denied Uranga's petition for rehearing. (App. 56).

Uranga filed a timely petition for review, which the Idaho Supreme Court granted. (App. 57). Following briefing and oral argument, the Idaho Supreme Court issued its Opinion (No. 52, 01.15 ISCR 583) on June 21, 2001, reversing the District Court's grant of summary judgment and setting aside the decision of the Court of Appeals. (App. 16).

The Statesman filed a timely petition for rehearing, which the Idaho Supreme Court granted along with numerous applications from national publishing corporations and other entities to appear amicus curiae. (App. 60). After briefing and oral argument, the Idaho Supreme Court issued its Opinion (No. 17, 03.5 ISCR 197), on February 14, 2003, affirming the District Court's grant of summary judgment and setting aside its initial decision. (App. 1). The Idaho Supreme Court denied Uranga's petition for rehearing on April 14, 2003 (App. 62), and on the same date entered its order of Remittitur. (App. 63).

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REASONS FOR GRANTING THE WRIT

SUMMARY

This case presents important, unresolved issues of constitutional law arising from the clash between individual privacy rights and freedom of the press. The convergence of certain legally significant facts in this case provide a rare opportunity to define urgently needed "outer boundaries" in the collision between the ever diminishing rights of privacy of the individual and the rights of the free press, as they are increasingly exercised and defined by large corporate entities. If, contrary to the claim of Respondent and its amici, the press does not have an absolute right to publish the public record, then the primary issue here is whether, under certain limited, extreme circumstances, the balancing test of the doctrine of "newsworthiness" is applicable to publication of the public record.

In this case, the Statesman published in the Article a copy of the 40 year old police statement of Melvin Dir, admittedly knowing (App. 93) it contained hearsay allegations about Uranga's engaging in homosexual acts, knowing that Uranga was not involved in the events reported in the Article, knowing that there was no public interest in Uranga's identity, and knowing that Uranga's name was readily redactable from the Article. In the face of this complete scienter the Statesman published the Dir Statement without redacting Uranga's name in total disregard of the obvious and foreseeable devastation such disclosure would wreak on Uranga's most intimate privacy rights.

At stake in this case is the preservation and protection of the most obvious and acknowledged core areas of privacy (*Lawrence v. Texas*, 539 U.S. ___ (2003) (Slip Opinion, pp. 4, 6, 13, 18)) from exploitation and abuse of public records by the press under circumstances where the scienter of the press diminishes any legitimate claim of surprise or "chilling effect" on its freedoms under the First Amendment. In *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975) the Court expressed the concern that subjecting publication of public records to the sensibilities of the reasonable man would "invite timidity and self-censorship" in the press, making it difficult for the media to inform citizens about public business and yet stay within the law." *Id.* at 496. In an extreme case such as the present one, effective notice of the possibility of liability is generated by the obviousness and seriousness of the violation and the scienter of the press. The existence of such clear, common sense notice deprives the press from legitimately claiming that it is difficult to know when such possibility of liability arises restricting publication of public information. On the other hand, the mere existence of a defined liability in the obvious, extreme case will not serve to encroach upon the ability of the press to publish freely information from the public record without being intimidated.

Petitioner submits that such scienter occurs, as in this case, when there is a convergence of the following factors: (1) the disclosure will foreseeably result in an obvious, extreme violation of privacy, (2) no public interest in the particular disclosure exists, (3) the disclosure is readily subject to editing or deletion, and (4) the publisher has knowledge of the foregoing factors. Under such obviously extreme circumstances coupled with such complete scienter, Petitioner suggests there is no logical reason to treat publication of information from the public record differently from publication of other non-public information, with the result that the "newsworthiness" test would be applicable to the publication of such information. In other words, the press should not have absolute immunity to publish information from the public record in the rare, but obvious, circumstances of the convergence of the above four factors as presented by this case.

In its final opinion, the Idaho Supreme Court held that the facts of this case cannot be distinguished from *Cox Broadcasting*. (App. 14). Petitioner respectfully submits that the facts of this case do not support, but in fact defy, the *ratio decidendi* of the Idaho Supreme Court in applying the holding of this Court in *Cox Broadcasting* to this case. (App. 14). In fact, as the following argument contends, this case is exactly the one the Court in *Cox Broadcasting* acknowledged that it did *not* have before it, namely "we do not have at issue here an action for . . . intrusion into a private area or a publication of otherwise private information that is also false. . . . " *Cox Broadcasting, supra*, 420 U.S. at 489.

THE HOLDING OF *COX BROADCASTING* IS NOT APPLICABLE TO THIS CASE.

In its Opinion of February 14, 2003, the Idaho Supreme Court stated that "the instant case is not sufficiently distinguishable from *Cox Broadcasting*. The First and Fourteenth Amendments do not permit the Statesman to be held liable in damages for accurately publishing a document contained in a Court Record open to the public." (App. 14).

Petitioner contends that *Cox Broadcasting* does not control and is not applicable because the information in the Dir Statement is not "true information," as is required in *Cox Broadcasting* as the basis of its specifically narrow holding *Cox Broadcasting, supra* at 491, 495, 496. Although Uranga has denied the allegations in the Dir Statement, his causes of action for intrusion and for publication of private acts are neutral as regards the verity of the alleged facts. In the case of *Baker v. Burlington Northern, Inc.*, 99 Idaho 688, 587 P.2d 829 (1978), in a case involving the public disclosure of embarrassing private facts, the Idaho Supreme Court described that tort as follows:

> The action for public disclosure of private facts will lie *even though the matter disclosed is true. Peterson v. Idaho First National Bank, Supra.*

99 Idaho at 691 (emphasis supplied).

As pointed out by this Court in *Cox Broadcasting,* the "real gravamen of the claimed injury" in an action for public disclosure of private facts "is the publication of information, *whether true or not*, the dissemination of which is embarrassing or otherwise painful to an individual. . . . " (emphasis supplied) 420 U.S. at 489. Hence, this case deals with facts about which the truth is irrelevant or at most, unknown. The *Cox Broadcasting* holding limits attachment of the First Amendment privilege of the press only to "true information" found in the public record. *Id.* at 495, 496. The opinion in *Cox Broadcasting* is expressly narrow and holds only that "[o]nce *true* information is disclosed in public court documents open to public inspection, the press cannot be sanctioned for publishing it." *Id.* at 496 (emphasis added). This Court's more recent cases in this arena, *Florida Star v. B.J.F.*, 491 U.S. 541 (1989); *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97 (1979); *Oklahoma Publishing Co. v. Oklahoma County District Court*, 430 U.S. 308 (1977), also involved the publication of truthful information obtained from public sources.

The holdings in opinions of this Court dealing with the clash between privacy rights and the First Amendment have, without exception, been narrowly tailored and limited to the specific facts in each case. In this context, this Court explained the reasoning for limiting such holdings in its opinion in *Florida Star*:

> The tension between the right which the First Amendment accords to a Free Press, on the one hand, and the protections which various statutes and common-law doctrines accord to personal privacy against the publication of *truthful information*, on the other, is a subject we have addressed several times in recent years. Our decisions and cases involving government attempts to sanction the accurate dissemination of information as invasive of privacy, have not, however, exhaustively considered this conflict. On the contrary, although our decisions have without exception upheld the press's right to publish, *we have emphasized each time that we were resolving this conflict only as it arose in a discreet factual context.*

491 U.S. at 530 (emphasis supplied).

In the recent case of *Bartnicki v. Vopper*, 532 U.S. 514 (2001), this Court reaffirmed its refusal to construe the First Amendment and privacy issues broadly and refused to answer categorically whether "truthful" publication may ever be punished consistent with the First Amendment.

Rather,

> [our] cases have carefully eschewed reaching this ultimate question, mindful that the future may bring scenarios which prudence counsels are not resolving anticipatorily. . . . We continue to believe that the sensitivity and significance of the interests presented in clashes between [the] First Amendment and privacy rights counsel relying on limited principles that sweep no more broadly than the appropriate context of the instant case.

(Quoting *Florida Star,* 491 U.S., at 532-33) *Id.* at 525-526.

Accordingly, the holding of the Court in *Cox Broadcasting* was limited to publication of "truthful information" contained in Court Records. This limitation is further explained by the Court in *Cox Broadcasting* as follows:

> [The] First and Fourteenth Amendments command nothing less than the States may not impose sanctions on the publication of *truthful information* contained in official records open to public inspection.

420 U.S. at 425 (emphasis added).

Petitioner suggests that *Cox Broadcasting* was not intended to address whether the First Amendment shield extended to accurate reports of information contained in public records that was untruthful or about that which the truth was not known. The holding in *Cox Broadcasting* is limited to facially accurate reports of substantially true information contained in a public record. (420 U.S. at 489, 495, 496). The Court in *Cox Broadcasting* appears to mix indiscriminately the concept of "accuracy" (420 at 492), or as a synonym, "truthful publication" (420 at 491, 495, and 496) with the concept of publication of information that is substantially true (truthful information or true information) (420 at 495, 496). Although such linguistic imprecision serves to create confusion, a careful reading can distinguish the use of the word "truth" as applied to publication and meaning "accurate" from its use to denote substantial verity.

Even with regard to the publication of truthful information, the constitutional privilege established in *Cox Broadcasting* is not absolute. As Justice Rehnquist noted in his concurrence in *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97 (1979):

> While we have shown a special solicitude for freedom of speech and of the press, we have eschewed absolutes in favor of a more delicate calculus that carefully weights the conflicting interests to determine which demands the greater protection under the particular circumstances presented.

Id. at 106 (citations omitted).

In *Cox Broadcasting,* the Court expressly refused to address the broader question of "whether truthful publications may ever be subjected to civil or criminal liability consistently with the First and Fourteenth Amendments. . . . " *Id.* at 491. Likewise, in *Florida Star* the Court refrained from declaring an absolute privilege in the press to publish truthful information from the public sources:

> We do not hold that truthful publication is automatically constitutionally protected, or that there is no zone of personal privacy within which the State may protect the individual from intrusion by the press, or even that a State may never punish publication of the name of a victim of a sexual offense. We hold only that where a newspaper publishes truthful information which it has lawfully obtained, punishment may lawfully be imposed, if at all, only when narrowly tailored to a state interest of the highest order. . . .

491 U.S. at 541.

In addition to the nonexistence of an absolute privilege in the press to publish information from public sources and to the non-truthful information involved in this case, another significant factual distinction between this case and *Cox Broadcasting* is to be found in the fact that the Dir Statement was not involved or used in any judicial proceeding, never accepted as evidence, and was not incorporated in any court pleadings. (App. 77, 79). The Court in *Florida Star* distinguished that case from *Cox Broadcasting* on a similar basis, because the

> role the press plays in subjecting trials to public scrutiny . . . is not directly compromised where, as here, the information in question comes from a police report prepared and disseminated at a time at which not only had no adversarial criminal proceedings begun, but no suspect had been identified.

491 U.S. 532.

Clearly, the responsibility of the press to subject trials to public scrutiny and report on criminal activity, as was stressed in *Cox Broadcasting,* is not compromised by rejecting an absolute privilege in the press to publish the Dir Statement and applying the newsworthiness test. See also, *Diaz v. Oakland Tribune, Inc.*, 139 Cal. App. 3d 118, 188 Cal. Reptr. 762, 771 (App. 1983). in which a newspaper's revelation that a candidate for student body president was a transsexual resulted in the Court concluding after an exhausted analysis of the applicable law, that "because of its narrow holding, *Cox Broadcasting Corp.* gives us little guidance," and that, therefore, the proper analysis of the case required consideration of the newsworthiness of Mr. Diaz's sexual identity. 139 Cal. App. 3d at 132.

Further, the Court in *Cox Broadcasting* assumed that "by placing the information in the public domain on official court records, the State must be presumed to have concluded the public interest was thereby being served." 420 U.S. at 495. Even though the Dir Statement is a court record under the terms of Idaho Court Admin. Rule 32, the fact remains that States, including Idaho, have only limited control over what is filed in court files. Clearly, a document filed in a court file does not automatically assume public importance. It is unrealistic to assume that deputy court clerks have the training or the means of scrutinizing and determining which documents should be filed. It is highly unlikely any State court system will be created, which will analyze each document that is presented for filing as to its relevance and/or propriety for filing in the specific case and will later selectively purge files of documents no longer relevant or necessary to be kept. Moreover, to assume that the press is automatically shielded from liability for publishing any document filed in a court file would be circumventing the holdings of the Court in effectively creating absolute immunity by another means. Petitioner submits that the publisher should be responsible for each publication on its own merits and subject to potential liability under the newsworthiness test when placed on notice on the basis of the criterion set forth above in obviously extreme cases

THE NEWSWORTHINESS DOCTRINE PROVIDES SUFFICIENT STANDARDS FOR DETERMINING WHETHER PUBLICATION OF A PUBLIC RECORD MERITS FIRST AMENDMENT PROTECTION

The newsworthiness test for determining what is a matter of legitimate public interest is set forth in RESTATEMENT (2D) TORTS Section 652D CMT. H (1976), as follows:

> Account must be taken of the customs and conventions of the community; and in the last analysis what is proper becomes a matter of

> community mores. The line is to be drawn when the publicity ceases to be the giving of information to which the public is entitled, and becomes a morbid and sensational prying into the private lives for its own sake, with which a reasonable member of the public, with decent standards, would say that we had no concern.

This "community mores" test was criticized by the Statesman as being vague and indefinite. Nevertheless, it is fair to say, ultimately, all standards and tests in law contain an element of balancing interests at the extremities of their application. And, in virtually every case, the values of these interests are imbedded in community mores. Clearly, the application of the newsworthiness doctrine and its inherent balancing of interests test are applicable to public record cases only in the extreme cases, such as this case. This newsworthiness test "properly restricts liability for public disclosure to the extreme case, thereby providing the breathing space needed by the press." *Robert C. Ozer P.C. v. Borquez*, 940 P.2d 371, 378-379 (Col. 1997) (Quoting *Gilbert*, 665 F.2d at 308). See also *Virgil v. Time, Inc.*, 527 F.2d 1122, 1129 (9th Cir. 1975). In this regard, the Idaho Supreme Court in its June 21, 2001, Opinion stated:

> As a refinement of the RESTATEMENT'S test for newsworthiness, many Courts additionally assess whether there is a logical relationship or nexus, or lack thereof, between the events or activities that brought the person into the public eye and the particular facts disclosed. See *E.G. Shulman*, 955 P.2d at 484-85. "This approach . . . balances the public's right to know against the Plaintiff's privacy interests by drawing a protective line at the point the material revealed ceases to have any substantial connection to the subject

> matter of the newsworthy report." *Id.* We agree these are relevant considerations to be analyzed in determining whether the publication of the Dir Statement, including Uranga's name, was a matter of legitimate public concern.

01.15 ISCR 587. (App. 35-36).

By the same rationale, the above referenced four factors may be employed as part of the application of the newsworthiness doctrine and its inherent balancing of interests test. Accordingly a determination can be made by the cognizant publisher that a particular item within an article is so obviously invasive of privacy and extrinsic and unconnected with the public interests of the article itself, as balanced against the value or interest of disclosure, so as to justify its redaction or deletion. Consideration of the convergence of the four factors present in this case are discussed below.

In light of the legal inapplicability of *Cox Broadcasting* to the facts of this case, the Court is urged to apply the newsworthiness doctrine to this case. The newsworthiness doctrine is particularly applicable to this case because of the unique scienter or knowledge on the part of the Statesman regarding the identification of Uranga in the context of the Dir Statement, its extreme violation of Uranga's privacy, its lack of public import, its lack of relevance to the legitimate public interest aspects of the Article, and the ready redactability of his name. Therefore, having scienter, The Statesman cannot claim to be subjected to any "chilling effect" because of lack of notice in the exercise of its First Amendment rights, since it is aware of the potential liability and there is no need to independently verify the allegations found in the public record.

In all of its Opinions on this subject, this Court has abjured making a ruling that the press has an absolute Constitutional privilege to publish the public record. In *Florida Star* the Court suggested that an exception may well exist under certain circumstances to the absolute Constitutional privilege that has always been claimed by the press. 491 U.S. at 532, 541.

Uranga submits that this case is such an exception by reason of the Statesman's scienter or specific knowledge of the facts in this case, as admitted by the Statesman in discovery. (App. 91-95). The uncontroverted evidence shows that at the time of the publication of the article, the Statesman knew the following facts:

(a) The Statesman was the largest circulation daily newspaper in Boise, Idaho;

(b) The Statesman knew Uranga was a resident of Boise;

(c) The Statesman knew the Dir Statement as published in the article accused Uranga of sexual liaisons with his cousin Frank Jones. (App. 93);

(d) The Statesman knew persons "accused" of homosexual conduct or even those persons "simply rumored about" "always" suffer "desperate pain" that "linger[s] and linger[s]." (App. 68, 88-90);

(e) The Statesman knew that Frank Jones was "chewed up" by unsubstantiated accusations of homosexual conduct. (*Id.*);

(f) The Statesman knew that Uranga, a cousin of Frank Jones, was a member of the Jones family. (App. 65, 67, 86);

(g) The Statesman knew that the article "caused" the "surviving members of the Jones family" "understandable anguish." (App. 68, 88-90);

(h) The Statesman did publish Uranga's name in connection with the article and that it did so "knowingly and intentionally." (App. 93);

(i) That portion of the Dir Statement regarding the alleged sexual liaisons of Uranga was obvious hearsay and the Statesman is reasonably charged with the knowledge that said allegations were hearsay.

The foregoing uncontroverted evidence shows that the Statesman knew that the distribution of its newspaper containing the most personal revelations of Uranga's private life to thousands of homes in Uranga's hometown would obviously be an extreme invasion of Uranga's privacy, intrude upon his solitude and seclusion, and inflict desperate lingering pain and extreme mental suffering. The Statesman knew that Uranga's name was easily redactable from the copy of the Dir Statement. In fact, in that portion of the Article mentioning the subject allegations about Uranga, his name is omitted and a blank line inserted where the reference to him is made. (App. 78, para. 3). Other than in the Dir Statement, Uranga's name does not appear in the Article.

In the face of this specific knowledge regarding Fred Uranga and the allegations contained in the Dir Statement, the Statesman knowingly and intentionally proceeded with the publication of the Dir Affidavit in the Article even though disclosure of his name was not of any public interest or concern and was extrinsic to the purpose of the Article. It is this element of knowledge or scienter on the part of the Statesman and its intentional behavior, despite its knowledge, in publishing the Dir Statement without retracting Uranga's name that makes the newsworthiness doctrine applicable to this case. This scienter is the most essential element in the convergent four factual elements present in this case, because it gives rise to the notice of the possible liability the Statesman may be charged with in the publication of Uranga's name in connection with the allegations regarding him in the Dir Statement.

It is the application of the newsworthiness doctrine to the convergence of the above four factors which justify the exception claimed by Uranga in this case to the general presumption of constitutional privilege of the press to publish the public record. Inherent in the balancing of said interests under the newsworthiness doctrine are the standards "of the customs and conventions of the community" RESTATEMENT SECOND TORTS Section 652d cmt.h (1976). In this case, in which the Statesman has admitted scienter as above described, it cannot be heard to claim that it is looking over its shoulder or that it is subjected to any "chilling effect" in the exercise of its First Amendment rights if the newsworthiness doctrine is applied as the test of liability in this case. Accordingly, Petitioner submits that the newsworthiness doctrine should be applied to determine the liability of the Statesman under the circumstances of this case.

◆

CONCLUSION

Petitioner Uranga respectfully requests this Court to grant this petition for writ of certiorari to review the merits of the order and opinion of the Idaho Supreme Court entered on February 14, 2003.

Respectfully submitted,

JOHN L. RUNFT
Counsel of Record
Attorney for Petitioner
1020 W. Main St., Ste. 370
Boise, Idaho 83702
(208) 333-8506

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APPENDIX A

opinion to be reviewed

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IN THE SUPREME COURT OF THE STATE OF IDAHO

Docket No. 27118

FRED URANGA,) **Boise, November**
Plaintiff-Appellant,) **2002 Term**
)
v.) **2003 Opinion No. 17**
)
FEDERATED PUBLICATIONS, INC., DBA THE) **Filed: February 14,**
IDAHO STATESMAN,) **2003**
)
) **Frederick C. Lyon,**
Defendant-Respondent.) **Clerk**

Appeal from the District Court of the Fourth Judicial District of the State of Idaho, Ada County, Hon. D. Duff McKee, District Judge.

The judgment of the district court is *affirmed*.

John L. Runft, Boise, argued for appellant.

Givens, Pursley, LLC, Boise, for respondent. Debora K. Kristensen argued.

ON REHEARING

EISMANN, Justice.

Fred Uranga (Uranga) appeals the district court's judgment in favor of Federated Publications, Inc., d/b/a *The Idaho Statesman* (*Statesman*) dismissing, on motion for summary judgment, Uranga's claims for invasion of privacy and reckless infliction of emotional distress arising out of the publication by the *Statesman* of an article containing a photographic representation of a forty-year-old document from a court file accusing Uranga of homosexual activity. We affirm the district's court grant of summary judgment dismissing Uranga's complaint based upon the protections of the First Amendment to the Constitution of the United States.

I. FACTS AND PROCEDURAL HISTORY

On Sunday, October 15, 1995, the *Statesman* published a front-page story entitled "The Boy Most Likely" concerning events that occurred in Boise in 1955 and 1956 surrounding an investigation that began with allegations that adult homosexual men were propositioning teenage boys at the YMCA. As the investigation grew, law enforcement officials interrogated approximately 1,500 people and arrested sixteen suspects. The events became known as the "Boys of Boise" scandal.

The *Statesman* story centered upon Frank Jones, the son of a Boise City Councilman, who had been accepted to the United States Military Academy at West Point. According to the story, six months after Frank entered West Point a man named Melvin Dir was charged with a felony for allegedly performing oral sex upon Frank two years earlier. Frank apparently admitted the sexual encounter during a taped interview at West Point, but alleged that Dir had forced him to have sex at gunpoint. Dir denied Frank's allegations regarding the use of force, and on January 7, 1956, he gave a handwritten, one-page, unsworn statement (Dir Statement) recounting his version of what occurred. In that statement, Dir wrote, "Afterwards we [Dir and Frank] talked about gay affairs that he [Frank] had had with [a classmate] and his cousin Fred

Uranga." As a result of the investigation, Frank was kicked out of West Point.

In its "The Boy Most Likely" story, the *Statesman* printed a photographic representation of the Dir Statement, including the allegation regarding Uranga. In the body of the story, it summarized that portion of Dir's allegations as follows: "Afterward, they talked about sexual liaisons Frank had had with a high school classmate and with a cousin – both of whom Frank identified by name, according to Dir." The *Statesman* did not mention Uranga's name in the body of the story.

After the *Statesman* story was published, Uranga submitted a written request that it retract the sentence in the Dir Statement that implicated him in homosexual activity, claiming that the statement was libelous and invaded his privacy. The *Statesman* refused to do so, but offered to permit Uranga to submit a written response to be published in a "Speaker's Corner" feature to appear on the editorial page. If Uranga did not want to submit a written response, the *Statesman* offered to publish an explanation of its publication of the Dir Statement and to state that the *Statesman* does not have any opinion as to the veracity of Dir's written statement and did not intend to imply that it was truthful.

On October 14, 1997, Uranga filed a complaint against the *Statesman* alleging claims for invasion of privacy and intentional and/or reckless infliction of emotional distress. The *Statesman* filed an answer and then moved for summary judgment on the grounds that it was immune from liability under the First Amendment and under the fair report privilege. After argument, the district court orally granted the motion on both grounds. On October 20, 1998, the district court entered a written order granting summary judgment and dismissing Uranga's complaint with prejudice.

Uranga timely appealed, and this case was assigned to the Court of Appeals, which upheld the district court's grant of summary judgment. Uranga then filed a petition for review, which this Court granted. After hearing oral argument, this Court issued an opinion on June 21, 2001, vacating the judgment of the district court. The *Statesman* then filed a petition for rehearing, which this Court granted.

II. STANDARD OF REVIEW

In cases that come before this Court on a petition for review of a Court of Appeals decision, this Court gives serious consideration to the views of the Court of Appeals, but directly reviews the decision of the lower court. *Head v. State,* 137 Idaho 1, 43 P.3d 760 (2002). In an appeal from an order of summary judgment, this Court's standard of review is the same as the standard used by the trial court in ruling on a motion for summary judgment. *Infanger v. City of Salmon,* 137 Idaho 45, 44 P.3d 1100 (2002). All disputed facts are to be construed liberally in favor of the non-moving party, and all reasonable inferences that can be drawn from the record are to be drawn in favor of the non-moving party. *Id.* Summary judgment is appropriate if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. *Id.* If the evidence reveals no disputed issues of material fact, then only a question of law remains, over which this Court exercises free review. *Id.*

III. ANALYSIS

The complaint that Uranga filed against the *Statesman* alleged three counts of invasion of privacy and one count of intentional and/or reckless infliction of emotional distress. The invasion of privacy counts were labeled "Invasion of Privacy by Intrusion," "Invasion of Privacy by Publication of Private Facts," and "Invasion of Privacy by Placing Plaintiff in False Light."[1]

Liability for a claim of invasion of privacy by intrusion must be based upon an intentional interference with the plaintiff's interest in solitude or seclusion, either as to his person or as to his private affairs or concerns. *Hoskins v. Howard,* 132 Idaho 311, 971 P.2d 1135 (1999); RESTATEMENT (SECOND) OF TORTS § 652B cmt. a (1976). This form of invasion of privacy does not depend upon any publicity given to the person whose interest is invaded or to his affairs. RESTATEMENT, *supra.* "To be actionable, the prying or intrusion into the plaintiff's private affairs must be of a type which is offensive to a reasonable person." *Hoskins,* 132 Idaho at 317, 971 P.2d at 1141.

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[1] This Court has recognized four categories of invasion of privacy: (1) Intrusion upon the plaintiff's seclusion or solitude, or into his private affairs; (2) Public disclosure of embarrassing private facts about the plaintiff; (3) Publicity which places the plaintiff in a false light in the public eye; and (4) Appropriation, for the defendant's advantage, of the plaintiff's name and likeness. *Hoskins v. Howard,* 132 Idaho 311, 971 P.2d 1135 (1999).

Although Uranga labeled his first cause of action "Invasion of Privacy by Intrusion," he did not allege any intrusion into any place where he had secluded himself, or any overseeing or overhearing of his private affairs, or any other form of investigation or examination into his private concerns. In fact, he did not even allege how the *Statesman* obtained the Dir Statement. Instead, Uranga alleged:

> At the time of the publication of the article, Defendant knew or should have known that Plaintiff did not wish or desire the allegations contained in the suspect statement to be exposed to the general public and that such publication would violate Plaintiff's privacy. Defendant's conduct in publishing the suspect statement without first taking care to redact Plaintiff's name was intentional and/or reckless, constituting an outrageous violation of Plaintiff's right to privacy.

Uranga also alleged that many of his friends, neighbors, acquaintances, business associates, and family had read the article and had seen the reference to himself. The only possible intrusion under the facts of this case was the *Statesman*'s conduct in investigating court records that are open to the public. The examination of a public court record cannot be the basis of a claim for invasion of privacy by intrusion. *Baker v. Burlington Northern, Inc.,* 99 Idaho 688, 587 P.2d 829 (1978); RESTATEMENT, *supra,* cmt. c.

In his complaint, Uranga also alleged a claim for false light invasion of privacy. Liability under that type of invasion of privacy requires public disclosure of some falsity or fiction concerning the plaintiff. *Hoskins v. Howard,* 132 Idaho 311, 971 P.2d 1135 (1999); RESTATEMENT, *supra,* § 652E cmt. a. In his briefs submitted in connection with his petition for review, Uranga abandoned his claim for false light invasion of privacy. His stated reason for doing so was as follows:

> The appellate court's finding that a requirement that the press must independently verify all allegations found in a court record before publishing the information would impose an arduous burden on the press leading to sort of a chilling effect on press coverage and would be violative of the First Amendment, clearly precludes Uranga from proceeding under his false light privacy claim.

Thus, the only claim for invasion of privacy remaining is invasion of privacy by public disclosure of embarrassing private facts.

The cause of action for public disclosure of embarrassing private facts "provides for tort liability involving a judgment for damages for publicity given to true statements of fact." RESTATEMENT (SECOND) OF TORTS § 652D special note (1976). The issue before us in this case is whether, consistently with the First and Fourteenth Amendments to the Constitution of the United States, a person can have a cause of action for invasion of privacy by public disclosure of embarrassing private facts caused by the accurate publication of information in a court record open to the public.

When the *Statesman* published a photographic reproduction of the Dir Statement, the Statement was a court record. "[R]ecords of a court includes all documents, material or records in the possession of the clerk, justice, judge, magistrate or staff of the court whether or not it is filed in a case before the court." IDAHO COURT ADMIN. R.

32(b)(4) (1995). Although there is nothing before us indicating who placed the Dir Statement in the court file or why it was placed there, it is undisputed that the Dir Statement was located in a court file when the *Statesman* photographed the Statement.

Court files are open to the public for examination, inspection, and copying unless the record is exempt from disclosure by statute, case law, or court rule. IDAHO COURT ADMIN. R. 32(c)(4) (1995). Rule 32(d) specifies certain categories of files and records that are exempt from disclosure, but there is no showing that the Dir Statement would be included in any of those categories. Rule 32(f) permits a court, on a case-by-case basis, to prohibit or limit the disclosure of records that would otherwise be open to the public, but there is nothing indicating that an order was ever entered prohibiting or limiting disclosure of the Dir Statement. Likewise, Uranga has not pointed to any statute or case law that would exempt the Dir Statement from disclosure. Thus, in 1995 the Dir Statement was a court record open to the public. The *Statesman* did not obtain a copy of the Statement by using any improper means.

In *Cox Broadcasting Corporation v. Cohn,* 420 U.S. 469 (1975), the United States Supreme Court addressed the issue of whether, consistently with the First and Fourteenth Amendments, a state may grant a cause of action for invasion of privacy caused by the publication of information obtained from a court record. In *Cox Broadcasting,* the information published was the name of a deceased, teen-aged rape victim. Six youths had been indicted for the murder and rape, and eight months later they appeared in court where five of them pled guilty to rape or attempted rape, the murder charge having been dropped. The trial of the sixth youth was set for a later date. During the course of the court proceedings that day, a reporter employed by Cox Broadcasting Corporation approached the clerk of the court during a recess and asked to see a copy of the indictments. The clerk handed the reporter the indictments, from which he learned the name of the victim. Later that day, Cox Broadcasting broadcast the victim's name during its television coverage of the court proceedings. A state statute made it a misdemeanor to publish or broadcast the name of a rape victim. The victim's father then filed an action for damages against Cox Broadcasting, based upon the misdemeanor statute and common law invasion of privacy. The trial court granted summary judgment to the plaintiff on the issue of liability, and on appeal the state supreme court held that the plaintiff might have a common law claim for invasion of privacy based upon the publication of his daughter's name. On rehearing, the state supreme court held that the statute making it a crime to publish the name of a rape victim was constitutional as a legitimate limitation on the right of freedom of expression and that the statute declared the state policy that the victim's name was not a matter of public interest. On appeal, the United States Supreme Court held that the protection of freedom of the press provided by the First and Fourteenth Amendments barred the state from making the defendant's broadcast of the rape victim's name a basis for civil liability.

The Supreme Court began its analysis by recognizing that the issue was the conflict between the right of privacy, enjoyed by all individuals, and the constitutional freedoms of speech and press. "Because the gravamen of the claimed injury is the publication of information, whether true or not, the dissemination of which is embarrassing or otherwise painful of an individual, it is here that claims of privacy most directly confront the constitutional freedoms of speech and press." *Cox Broadcasting* at 489. The Court recognized that these are both significant concerns for society. "In this sphere of collision between claims of privacy and those of the free press, the interests on both sides are plainly rooted in the traditional and significant concerns of our society." *Id.* at 491. To resolve this conflict, the Supreme Court focused upon the strengths of the competing interests.

With respect to the interest in the right of privacy, the Court noted that such interest diminishes when the invasion of that right is based upon the publication of information contained in a record that is open to the public. Quoting from the Tentative Draft of the Second Restatement of Torts, the Court stated as follows:

> Tentative Draft No. 13 of the Second Restatement of Torts, §§ 652A-652E, divides the privacy tort into four branches; and with respect to the wrong of giving unwanted publicity about private life, the commentary to § 652D states: "There is no liability when the defendant merely gives further publicity to information about the plaintiff which is already public. Thus there is no liability for giving publicity to facts about the plaintiff's life which are matters of public record. . . ."[2]

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[2] The wording quoted by the Supreme Court from the Tentative Draft of the Restatement remained in the final draft. RESTATEMENT (SECOND) OF TORTS § 652D cmt. b (1976).

Cox Broadcasting at 494. Based upon the lack of liability for invasion of privacy when the invasion is based upon the publication of information in records open to the public, the Court concluded that in such circumstance there was little interest in protecting the right of privacy. The Court concluded, "Thus even the prevailing law of invasion of privacy generally recognizes that the interests in privacy fade when the information involved already appears on the public record." *Id.* at 494-95.

With respect to the freedoms of speech and the press, the Court noted that there is a significant public interest in reporting the commission of crime, resulting prosecutions, and judicial proceedings arising from those prosecutions. The Court emphasized, "The special protected nature of accurate reports of judicial proceedings has repeatedly been recognized." *Id.* at 492. The Supreme Court was also concerned about the chilling effect upon the freedoms of speech and press if liability for invasion of privacy could be based upon the reporting of information contained in records open to the public.

> We are reluctant to embark on a course that would make public records generally available to the media but forbid their publication if offensive to the sensibilities of the supposed reasonable man. Such a rule would make it very difficult for the media to inform citizens about the public business and yet stay within the law. The rule would invite timidity and self-censorship and very likely lead to the suppression of many items that would otherwise be published and that should be made available to the public.

Id. at 496. The Court then stated, "At the very least, the First and Fourteenth Amendments will not allow exposing the press to liability for truthfully publishing information released to the public in official court records." *Id.*

Finally, the Court noted that the States could protect the privacy interests of individuals by limiting the information placed in court records. "If there are privacy interests to be protected in judicial proceedings, the States must respond by means which avoid public documentation or other exposure of private information." *Id.* The Supreme Court stressed this latter factor again in *The Florida Star v. B.J.F.,* 491 U.S. 524 (1989), in which the Court held that a weekly newspaper could not be held civilly liable for publishing the name of a rape victim. The Court stated, "Where information is entrusted to the government, a less drastic means than punishing truthful publication almost always exists for guarding against the dissemination of private facts." *Id.* at 534.

In *Baker v. Burlington Northern, Inc.,* 99 Idaho 688, 587 P.2d 829 (1978), this Court quoted from *Cox Broadcasting* in upholding the granting of a motion for summary judgment dismissing a claim for invasion of privacy by public disclosure of embarrassing private facts. The facts disclosed in *Burlington Northern* concerned the plaintiff's criminal record and were obtained from a check of public records. After quoting from *Cox Broadcasting,* this Court stated, "Thus, assuming that there was a public disclosure by Burlington Northern, the disclosure was of public, not private facts, and therefore such disclosure was not actionable under the second category of invasion of privacy." *Burlington Northern,* 99 Idaho at 692, 587 P.2d at 833.

The factors upon which the Supreme Court based its decision in *Cox Broadcasting* also weigh in favor of upholding the granting of summary judgment in this case. Uranga argues, however, that there are factual differences between this case and *Cox Broadcasting* that support the imposition of liability in his case.

Uranga argues that the information published in *Cox Broadcasting* concerned a current criminal prosecution, while the Dir Statement was connected with a criminal prosecution that had occurred almost forty years earlier. There is no indication that the First Amendment provides less protection to historians than to those reporting current events. "No suggestion can be found in the Constitution that the freedom there guaranteed for speech and the press bears an inverse ratio to the timeliness and importance of the ideas seeking expression." *Bridges v. California,* 314 U.S. 252 (1941).

Uranga also contends that even if the story published by the *Statesman* concerned a matter of public significance, his name was not newsworthy. Therefore, the *Statesman* should have redacted his name before publishing a copy of the Dir Statement. In *The Florida Star v. B.J.F.,* 491 U.S. 524 (1989), the Supreme Court addressed the issue of the public significance of publishing the name of the rape victim. The Court stated:

> It is, clear, furthermore, that the news article concerned 'a matter of public significance,' in the sense in which the *Daily Mail*[3] synthesis of prior cases used that term. That is, the article generally, as opposed to the specific identity contained within it, involved a matter of paramount public

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[3] *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97 (1979).

> import: the commission, and investigation, of a violent crime which had been reported to authorities.

Id. at 536-37 (citation omitted). The Supreme Court indicated that whether or not the article is a matter of public concern is based upon the article generally. Each fact included within the article need not be a matter of public significance.

Therefore, although the circumstances surrounding the publication in question certainly evoke sympathy for Uranga, this case cannot be distinguished from *Cox Publishing* based upon the age of the court record and the lack of significance in having Uranga's name appear in the story. Furthermore, Uranga has not offered any standard by which to determine when a court record is too old or a particular fact in such record too insignificant for its publication to merit First Amendment protection. Absent such a standard, there would be no way to judge in advance whether or not a publication would enjoy First Amendment protection. The "timidity and self-censorship" which may result from the lack of such a standard is precisely what the Supreme Court sought to prevent in *Cox Publishing* and *The Florida Star.*

The instant case is not sufficiently distinguishable from *Cox Broadcasting.* The First and Fourteenth Amendments do not permit the *Statesman* to be held liable in damages for accurately publishing a document contained in a court record open to the public. Changing the cause of action from invasion of privacy to infliction of emotional distress does not circumvent the constitutional protection of the publication. *See Dworkin v. Hustler Magazine Inc.,* 867 F.2d 1188, 1193 n. 2 (9th Cir. 1989).

In *Cox Broadcasting,* the Supreme Court stated, "In this instance as in others reliance must rest upon the judgment of those who decide what to publish or broadcast." 420 U.S. at 496. As James Madison said, "Some degree of abuse is inseparable from the proper use of every thing; and in no instance is this more true than in that of the press." 4 Elliot's Debates on the Federal Constitution 571 (1876 ed.).

IV. CONCLUSION

The judgment of the district court is affirmed. Costs on appeal are awarded to the respondent.

Justice WALTERS and Justices Pro Tem WESTON, J., SMITH, J., and BURDICK, J., **CONCUR.**

APPENDIX B

other opinions entered in this case:

Initial Opinion of Idaho Supreme Court .... App. 16
Opinion of the Idaho Court of Appeals .... App. 40

IN THE SUPREME COURT OF THE STATE OF IDAHO

Docket No. 27118

FRED URANGA,	**2001 Opinion No. 52**
Plaintiff-Appellant,	**Twin Falls,**
v.	**March 2001, Term**
FEDERATED PUBLICATIONS, INC., DBA THE IDAHO STATESMAN,	**Filed: June 21, 2001**
Defendant-Respondent.	**Frederick C. Lyon, Clerk**

Appeal from the District Court of the Fourth Judicial District of the State of Idaho, Ada County. Hon. D. Duff McKee, District Judge.

District court's grant of summary judgment, *reversed.*

John L. Runft, Boise, for appellant.

Givens, Pursely, LLC., Boise, for respondent. Debora K. Kristensen argued.

TROUT, Chief Justice

This an appeal from the district court's order granting summary judgment in favor of Federated Publications, Inc., d/b/a *The Idaho Statesman* ("*Statesman*") and dismissing appellant, Fred Uranga's ("Uranga") claims for invasion of privacy and reckless infliction of emotional distress arising out of an article published by the *Statesman* containing a photographic representation of a forty-year-old statement accusing Uranga of homosexual activity.

I.

FACTUAL AND PROCEDURAL BACKGROUND

On Sunday, October 15, 1995, the *Statesman* published an article entitled "The Boy Most Likely" relating events occurring in Boise in 1955 and 1956 involving allegations of pedophilic and homosexual activity resulting in a "morals" investigation involving approximately 1,500 witness interrogations and 16 arrests. The events became known as the "Boys of Boise" scandal. The article specifically recounted the impact of these investigations on Frank Jones, the son of a Boise City Councilman, who was kicked out of Westpoint and eventually committed suicide. The October, 1995 article contained an unedited reprint of a sworn statement by Melvin Dir ("Dir Statement") dated January 7, 1956, stating that Dir had a gay affair with Frank Jones and Jones had recounted to him "gay affairs that he had had with . . . his cousin Fred Uranga." The body of the article also referred to the statement and restated that after Dir and Frank Jones "had mutual oral copulation . . . they talked about sexual liaisons Frank had had with a high school classmate and with a cousin – both of whom Frank identified by name, according to Dir." The article does not otherwise mention Uranga.

The Dir Statement was filed with the Clerk of the Idaho Fourth District Court in Case No. 2203 and remains there today. Dir pled guilty so he was never tried and other than to implicate Frank Jones, the Dir Statement was not used in any further proceedings.

After the *Statesman* story was published, Uranga submitted a written request for retraction of the one sentence of the Dir Statement that named him, claiming the statement was libelous and invaded his privacy. The *Statesman* responded, denying the request, and offering to publish Uranga's comments on the matter in a "Speaker's Corner" Feature to appear on the editorial page or alternatively to publish an explanation of the inclusion of the Dir Statement.

On October 14, 1997 Uranga filed a Complaint alleging four causes of action against the *Statesman*; (1) invasion of privacy by intrusion, (2) invasion of privacy by publication of private facts, (3) invasion of privacy by placing plaintiff in a false light[1], and (4) intentional and/or reckless infliction of emotional distress. The *Statesman* responded with affirmative defenses including the fair report privilege and a constitutional privilege to publish information in the public record under the First and Fourteenth Amendments. The *Statesman* subsequently filed a motion for summary judgment. The district judge issued an oral ruling granting summary judgment to the *Statesman* based on its constitutional privilege arguments under *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975) and the common law fair report privilege. A written order granting summary judgment and dismissing the Complaint with prejudice was issued October 20, 1998.

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[1] In the Brief in Support of Petition for Review and the Reply Brief in Support of Petition for Review Uranga abandons the "false light privacy claim".

Uranga timely filed a notice of appeal. The appeal was assigned to the Court of Appeals, which upheld the district court's grant of summary judgment. The Court of Appeals found the imposition of liability on the *Statesman* for the publication of the Dir Statement would be violative of the First Amendment under *Cox Broadcasting*.

Uranga filed a timely Petition for Review, which this Court granted.

II.

STANDARD OF REVIEW

When considering a case on review from the Court of Appeals, this Court gives serious consideration to the views of the Court of Appeals; however, this Court reviews the trial court's decision directly. *State v. Benefiel*, 131 Idaho 226, 953 P.2d 976 (1998).

This Court's review of a trial court's ruling on a motion for summary judgment is the same standard used by the trial court in originally ruling on the motion. *Sun Valley v. Rosholt, Robertson & Tucker,* 133 Idaho 1, 3, 981 P.2d 236, 238 (1999) (citing *Friel v. Boise City Hous. Auth.,* 126 Idaho 484, 887 P.2d 29 (1994). Pursuant to I.R.C.P. 56(c), summary judgment must be entered when "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." This Court liberally construes the record in favor of the party opposing the motion for summary judgment and draws any reasonable inferences and conclusions in that party's favor. *Id.* at 4, 981 P.2d at 239 (citing *Farn Credit Bank of*

Spokane v. Stevenson, 125 Idaho 270, 869 P.2d 1365 (1994)). If the evidence reveals no disputed issues of material fact, what remains is a question of law, over which this Court exercises free review. *Farm Credit Bank of Spokane,* 125 Idaho at 272, 869 P.2d at 1367.

III.

DISCUSSION

A. The *Statesman* does not have an absolute privilege to publish the Dir Statement.

1. The First and Fourteenth Amendments to the U.S. Constitution grant a broad, but not absolute, privilege to the press to publish matters of public record.

The *Statesman* argues it has an absolute constitutional privilege to publish the Dir Statement under United States Supreme Court precedent *Cox Broadcasting Corp. v. Cohn,* 420 U.S. 469 (1975), *The Florida Star v. B.J.F.,* 491 U.S. 524 (1989) and their progeny.

Cox Broadcasting, the only common law public disclosure tort case the United States Supreme Court has considered, involved a suit brought by the father of a deceased rape victim against a Georgia television station after the station reported the name of his victim-daughter. 420 U.S. at 474. The name had been obtained from judicial records open to public inspection during an open court session and maintained in connection with a public prosecution. *Id.* at 472-73. The father brought suit claiming his right to privacy had been invaded by the broadcast of his daughter's name. *Id.* at 474. The Georgia Supreme Court, relying on a Georgia statute prohibiting publication or broadcast of a rape victim's identify, held the broadcast of the victim's name was not privileged as newsworthy. *Id.* The state court further held the Georgia statute did not infringe on the television station's first Amendment rights. *Id.* at 475. The U.S. Supreme Court reversed. *Id.* at 497. The Court narrowly framed the issue before it as "whether, consistently with the First and Fourteenth Amendments, a State may extend a cause of action for damages for invasion of privacy caused by the publication of the name of a deceased rape victim which was publicly revealed in connection with the prosecution of the crime." *Id.* at 471. The Court held "[a]t the very least, the First and Fourteenth Amendments will not allow exposing the press to liability for truthfully publishing information released to the public in official court records." *Id.* at 496. Justice White, writing for the majority, explained that in the face of the First Amendment, the interests of privacy fade when the information involved appears in the public record:

> By placing the information in the public domain on official court records, the State must be presumed to have concluded that the public interest was thereby being served. . . . States may not impose sanctions on the publication of truthful information contained in official court records open to public inspection.

420 U.S. at 495. Justice White further cautioned that if there are privacy interests to be protected in the public record of judicial proceedings, public documentation and disclosure of the relevant information should be avoided, asserting the "States must respond by means which avoid public documentation or other exposure of private information." *Id.* at 496. In reaching this decision, the Court focused on the societal need for a press that can report

fully and accurately on the proceedings of the government. *Id.* at 491-92. Specifically, "[w]ith respect to judicial proceedings . . . the function of the press serves to guarantee the fairness of trials and to bring to bear the beneficial effects of public scrutiny upon the administration of justice." *Id.* at 492 (citing *Sheppard v. Maxwell*, 384 U.S. 333, 350 (1966)).

A similar conclusion was reached by the U.S. Supreme Court in *The Florida Star v. B.J.F.*, 491 U.S. 524 (1989); however, the action was not pled as a common law tort but rather as a negligence action with the state criminal statute used as a predicate for application of the negligence per se doctrine. *Id.* at 539. In *Florida Star*, the U.S. Supreme Court found unconstitutional the imposition of liability against a newspaper under a Florida statute that made it a crime to publish the name of the rape victim. *Id.* at 541. The name of the victim, however, was not found in the record of judicial proceedings, but was obtained from a police report. *Id.* at 532. The Court did not directly apply the precedent of *Cox Broadcasting*, distinguishing *Florida Star* because the

> role the press plays in subjecting trials to public scrutiny . . . is not directly compromised where, as here, the information in question comes from a police report prepared and disseminated at a time at which not only had no adversarial criminal proceedings begun, but no suspect had been identified.

Id. The Court again limited the holding, stating that:

> We do not hold that truthful publication is automatically constitutionally protected, or that there is no zone of personal privacy within which the State may protect the individual from intrusion

> by the press, or even that a Sate may never punish publication of the name of a victim of a sexual offense. We hold only that where a newspaper publishes truthful information which is lawfully obtained, punishment may lawfully be imposed, if at all, only when narrowly tailored to a state interest of the highest order. . . .

Id. at 541.

In Idaho, we have applied the principles of *Cox Broadcasting* in only one case, *Baker v. Burlington Northern Inc.,* 99 Idaho 688, 587 P.2d 829 (1978). In *Baker*, this Court precluded a cause of action for invasion of privacy based on an employer's disclosure of information concerning an employee's criminal record. *Id.* at 692, 587 P.2d at 833. The employer had gained information from the public record including a guilty plea and withheld judgment to the crime of burglary one year earlier, and included this information in a letter of termination that the employer sent to the employee and placed in its employment files. *Id.* 689-90, 587 P.2d at 830-31. The plaintiff alleged his right to privacy was violated by his employer's disclosure of his criminal record. *Id.,* 587 P.2d at 830-31. Citing *Cox Broadcasting*, we upheld the district court's grant of summary judgment denying a claim for public disclosure of private facts because the facts regarding Baker could not be "private" where "Baker's criminal activity was recent in origin and he was still on probation" and the publication "was merely a recitation of a public record of Baker's recent criminal activity." *Id.* at 692, 587 P.2d at 833.

The *Statesman* urges this Court to uphold the district court's determination that *Cox Broadcasting* creates an absolute privilege to report the information in the Dir

Statement. Clearly, the implications of *Cox Broadcasting* and *Florida Star* for the aspect of the right to privacy that limits the publication of private facts are profound. *Shulman v. Group W Productions Inc.,* 955 P.2d 469, 480 (Cal. 1988) (quoting *Haynes v. Alfred a. Knoptf, Inc.,* 8 F.3d 1222, 1232 (7th Cir. 1993)). The U.S. Supreme Court "must believe that the First Amendment greatly circumscribes the right even of a private figure to obtain damages for the publication of newsworthy facts about him, even when they are facts of a kind that people want very much to conceal." *Id.* The U.S. Supreme Court's decisions are instructive on the strength of First Amendment protection and establish that "truthful reporting on current judicial proceedings, using material drawn from public records, is generally within the scope of constitutional protection." *Id.* at 480-81. However, the constitutional privilege established in *Cox Broadcasting* is not absolute. As justice Rehnquist noted in his concurrence in *Smith v. Daily Mail Publishing Co.,* 443 U.S. 97 (1979):

> While we have shown a special solicitude for freedom of speech and of the press, we have eschewed absolutes in favor of a more delicate calculus that carefully weights the conflicting interests to determine which demands the greater protection under the particular circumstances presented.

Id. at 106 (citations omitted). The U.S. Supreme Court recently reaffirmed their refusal to construe First Amendment and privacy issues broadly and refused to "answer categorically whether truthful publication may ever be punished consistent with the First Amendment." *Bartnicki v. Vopper,* 532 U.S. ___, 2001 WL 530714 at *8 (2001).

> Rather,
>
> '[o]ur cases have carefully eschewed reaching this ultimate question, mindful that the future may bring scenarios which prudence counsels our not resolving anticipatorily. . . . We continue to believe that the sensitivity and significance of the interests presented in clashes between [the] First Amendment and privacy rights counsel relying on limited principles that sweep no more broadly than the appropriate context of the instant case.'

Id. (quoting *Florida Star*, 491 U.S., at 532-33). The U.S. Supreme Court's narrow review of clashes between the First Amendment and privacy, limiting their holdings to the interface between the press and privacy that each case presents, has specifically left open the question of "whether the State may ever define and protect an area of privacy free from unwanted publicity in the press." *Cox Broadcasting*, 420 U.S. at 491. *See also, Florida Star*, 491 U.S. at 541. The Supreme Court has not dealt with the interface between the press and privacy that this case presents: whether the First Amendment shield extends absolute protection to publish information contained in a forty-year-old public file not directly concerning a judicial proceeding. Unfortunately the parameters of the constitutional privilege under factually distinct circumstances have not been clearly delineated; nevertheless, because of the following factual distinctions between the case at hand and *Cox Broadcasting*, we find that case cannot fairly be read as controlling.

In *Cox Broadcasting* the information regarding the victim's name was obtained from several courses, including the murder and rape indictments that were part of the public record and from the reporter who personally attended the trial and took notes. 420 U.S. at 474, n.3. The Court specifically focused on the source of the information published, recognizing that with regard to judicial proceedings "the function of the press serves to guarantee the fairness of trials and to bring to bear the beneficial effects of public scrutiny upon the administration of justice." *Id.* at 492 (citing *Sheppard v. Maxwell*, 384 U.S. 333, 350, 86 S.Ct. 1507, 1555 (1966)). Furthermore, the Supreme Court reasoned that:

> The commission of crime, prosecutions resulting from it, and judicial proceedings arising from the prosecutions . . . are without question events of legitimate concern to the public and consequently fall within the responsibility of the press to report the operations of the government.

Id. at 492. We relied on this reasoning in *Baker* to find the claim for invasion of privacy was not actionable because the press' ability to report on recent criminal activity is of "critical importance to our type of government in which the citizenry is the final judge of the proper conduct of public business." *Baker*, 99 Idaho at 692, 587 P.2d at 833 (quoting *Cox Broadcasting*, 420 U.S. at 495). The Supreme Court distinguished *Florida Star* on this basis, finding the press' responsibility to subject trials to public scrutiny was not compromised where information was disseminated before adversarial proceedings had begun. *Florida Star*, 491 U.S. at 532. A similar distinction can be made here. Melvin Dir, not Fred Uranga, was the subject of a criminal investigation, and the forty-year-old Dir Statement was not used in an official or judicial proceeding, was never accepted as evidence, and was not embodied in a court pleading. Although the Dir Statement is in Dir's criminal case file, and is open to the public, the record before us does not reveal why or how the handwritten unsworn statement became part of the court file. The press' responsibility to subject trials to public scrutiny, and to apprise the public of matters concerning criminal activity, is not compromised by rejecting an absolute privilege to publish information only tangentially related to a forty-year-old case file.

The Court in *Cox Broadcasting* also reasoned that "[b]y placing the information in the public domain on official court records, the State must be presumed to have concluded the public interest was thereby being served." 420 U.S. at 495. States may have some limited control over what information is placed in an official court record, and who has access to that information, but no such control can reasonably be maintained over every piece of information that makes its way into a court file. We cannot presume that deputy court clerks have the means of scrutinizing and controlling information they are asked to file, and by filing information, have concluded it is in the public interest to forever shield the press from liability for publishing that information.

Cox Broadcasting further denied liability based on a reluctance to establish a rule that would invite "timidity and self-censorship" in the press, making it "difficult for the media to inform citizens about the public business and yet stay within the law." 420 U.S. at 496. The mere possibility of liability in an extreme case such as this does not encroach upon the ability of the press to freely publish current information regarding judicial proceedings and discuss governmental affairs, nor does it impede the public's ability to gain information about criminal activity. In addition, as discussed below in Section B, 1, even absent an *absolute* privilege, the publication may nevertheless be shielded if it concerns a matter of legitimate public concern.

Uranga argues the case at hand is also distinguishable because it is exactly the one *Cox Broadcasting* acknowledged it did *not* have before it, namely "we do not have at issue here an action for . . . intrusion into a private area or a publication of otherwise private information that is also false. . . . " 420 U.S. at 489. Uranga contends *Cox Broadcasting* therefore does not control because the information in the Dir Statement is untrue. The U.S. Supreme Court holdings in *Cox Broadcasting* and *Florida Star* are imprecise, and interchange the word "truthful" and "accurate". *Cox Broadcasting* demonstrates this imprecision by holding civil liability based upon the publication of "truthful" information contained in official court records is prohibited, while also stating the issue as whether the "accurate" publication of a rape victim's name contained in a judicial record subjects newspapers to liability. *Id.* at 491, 496. However, the opinion narrowly holds that "[o]nce *true* information is disclosed in public court documents open to public inspection, the press cannot be sanctioned for publishing it." *Id.* at 496 (emphasis added). Therefore, *Cox Broadcasting* cannot be read to create an absolute privilege to publish false information contained in a public court document.

Finally, *Cox Broadcasting* and *Florida Star* both involved a state criminal statute sanctioning the publication of information obtainable through a public record. Although the Supreme Court in *Cox Broadcasting* also ruled on the broader issue precluding the tort of publication of private facts, the Court limited the holding to the narrow facts of the case. 420 U.S. 496-97. Additionally, in *Florida*

Star, the high court found unconstitutional the criminal statute as well as application of a *per se* theory of negligence derived from the criminal statute, because of the categorical prohibition placed on the media. 491 U.S. 539-40. Idaho does not have a statute establishing such a categorical prohibition, nor does this case create such a prohibition. The *Statesman's* potential liability is based on common law tort theories as they apply to the facts of this case.

The U.S. Supreme Court has not established an absolute constitutional privilege of the press to publish information in a public file. Furthermore, the narrow holding and facts presented in *Cox Broadcasting* are clearly distinguishable from the case at hand. Therefore, we find the district court erred in granting summary judgment to the *Statesman* based on its application of *Cox Broadcasting*.

2. *The common law fair report privilege does not create an absolute privilege to publish the Dir Statement.*

The *Statesman* additionally asserts it has a privilege to report the information contained in the Dir Statement under the common law fair report privilege. The fair report privilege developed as an exception to the common law rule that the republisher of defamation was subject to liability similar to that of the original defamer. To ameliorate the chilling effect on the reporting of newsworthy events, there has developed a recognized privilege for the press to publish accounts of official proceedings or reports, even if they contain defamatory statements, so long as the account presents a fair and accurate summary of the proceedings.[2] This privilege applies without the newspaper having to establish the truth of the substance of the statement reported. RESTATEMENT (SECOND) TORTS § 611 cmt. A; DAN B. DOBBS, THE LAW OF TORTS 1162 (2000).

Idaho Code § 6-6713 codifies the common law fair report privilege with respect to *defamation* actions:

> **Privileged publication in newspaper defined.** – A privileged publication in a newspaper which shall not be considered as libelous is one made . . . (4) By a fair and true report, without malice, of a judicial, legislative or other public official proceeding, or of anything said in the course thereof. . . . "

It is questionable whether this privilege applies not only in the context of a defamation action, but also here, as a defense to a claim of invasion of privacy. Even if this Court extended the fair report privilege to include claims of invasion of privacy, this privilege does not logically extend to cloak the press in an absolute privilege to publish a statement regarding Uranga's sexuality found in a forty-year-old court file where the statement was not used in an official or judicial proceeding, was never entered into evidence, and was not in a court pleading. Furthermore, any "official" action taken did not involve Uranga, and the

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[2] § 611 of the RESTATEMENT (SECOND) TORTS provides: "Report of Official Proceeding or Public Meeting. The publication of defamatory matter concerning another in a report of an official action or proceeding or of a meeting open to the public that deals with a matter of public concern is privileged if the report is accurate and complete or a fair abridgement of the occurrence reported."

Statesman story only tangentially reports on the judicial proceeding involving Dir; therefore, the essence of the story does not implicate the *Statesman's* need to report on judicial proceedings nor the public's right to scrutinize them.

The *Statesman's* publication of the Dir Statement containing reference to Uranga is not absolutely privileged as a matter of law under the fair report privilege; therefore the district court erred in granting summary judgment based on this privilege.

B. The tort claims for invasion of privacy by intrusion, publication of private facts and intentional infliction of emotional distress may proceed.

The issue presented by the *Statesman's* Motion for Summary Judgment was not whether Uranga could sustain his burden of proving the elements of his causes of action, but whether, even assuming he could sustain his burden, the *Statesman* was immune from liability under the constitutional and fair report privileges. Because we find the privileges asserted are not absolute, we must consider whether the tort claims may proceed.

Publication of private facts and intrusion upon seclusion.

Although the privilege established in *Cox Broadcasting* is not absolute, the First Amendment may nevertheless protect what would otherwise be an actionable invasion of privacy for publication of private facts in cases where publication involves the media. *See Gilbert v. Medical Economics Co.*, 665 F.2d 305, 307 (10th Cir. 1981) (citing *Cox Broadcasting*, 420 U.S. 469) (citations omitted).

Where a private facts tort is asserted against the media, the right of the individual to keep information private must be balanced against the rights of free speech and free press which protect the public's access to information on matters of legitimate public concern. *Id.* at 307. *See also, Robert C. Ozer, P.C. v. Borquez*, 940 P.2d 371, 378 (Colo. 1997).[3] In attempting to strike an acceptable balance between these competing interests, the majority of states provide for liability for publicizing matters concerning the private life of another "if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public." *Gilbert*, 665 F.2d at 307 (citing RESTATEMENT (SECOND) TORTS § 652D (1977). Under this theory, to state a cause of action for public disclosure of private facts, the plaintiff must plead (1) public disclosure; (2) of private, not public, facts; (3) the matter publicized was highly offensive to a reasonable person; (4) the matter publicized was not of legitimate public concern. *See, e.g., Green v. Chicago Tribune Co.*, 675 N.E.2d 249 (Ill.App. 1 Dist. 1996). These elements are not specifically reflected in the tort for public disclosure of embarrassing private facts in Idaho, which historically consists of only three elements:

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[3] The U.S. Supreme Court's most recent discussion of the balance between privacy issues and the press reaffirmed their position that "privacy issues give way when balanced against the interest in publishing matters of public importance." *Bartnicki*, 2001 WL 530714 at *10. *Bartnicki* involves a suit brought under federal and state wiretapping statutes for the interception and publication of a cell phone conversation between the chief union negotiator and the union president involved in a contentious collective-bargaining negotiation between teachers and the local school board. *Id.* at *3-4. After the parties had reached an agreement, a radio commentator played a tape of the intercepted conversation on his public affairs talk show in connection with new reports about the settlement. *Id.* The U.S. Supreme Court addressed the narrow issue: "Where the punished publisher of information has obtained the information in question in a manner lawful in itself but from a source who has obtained it unlawfully, may the government punish the ensuing publication of that information based on the defect in a chain?" *Id.* at *7. The U.S. Supreme Court upheld the Court of Appeals determination that application of the wiretapping statutes in this case was unconstitutional because "they deter significantly more speech than necessary to protect the privacy issues at stake." *Id.* at *4, *11. The Court reasoned that the illegal conduct of the stranger who intercepted the cell phone conversation "does not suffice to remove the First Amendment shield from speech" that the Court had determined was "unquestionably a matter of public concern." *Id.* at *11. *Bartinicki* [sic], although not a private facts tort case, highlights the importance of narrowing the private facts tort in Idaho to ensure potential liability under the tort does not stifle the press' ability to report on matters of legitimate public concern.

> First, the disclosure of the private facts must be a public disclosure and not a private one. There must be, in other words, publicity.
>
> Second, the facts disclosed to the public must have been private facts, and not public ones.
>
> Third, the matter made public must be one which would be offensive and objectionable to a reasonable man or [sic] ordinary sensibilities.

Baker v. Burlington N., Inc., 99 Idaho 688, 691, 587 P.2d 829, 832 (1978) (quoting *Peterson v. Idaho First Nat'l Bank*, 83 Idaho 578, 583, 367 P.2d 284, 287 (1961)).

Unless we abandon the private facts tort completely we are at a theoretical risk of creating unconstitutional liability, especially where out tort law does not reflect a need to balance the interests of the press and a private individual. To accommodate this need, we find the fourth element, whether the matter is of legitimate public concern, must explicitly be included as an element of the tort claim for public disclosure of private facts.

Adoption of a fourth element to the claim of invasion of privacy for publication of private facts is not out of line with Idaho precedent that already implicitly discusses "legitimate public concern" as a factor of the tort in Idaho. For example, in *Taylor v. K.T.V.B., Inc.*, 96 Idaho 202, 525 P.2d 984 (1974), a pre-*Cox Broadcasting* case involving an invasion of privacy action against a TV station for airing footage of the arrestee being arrested in the nude, this Court noted that persons charged with crimes are the "objects of legitimate public interest during a time after their conduct . . . has brought them to public attention" *Id.* at 205, 525 P.2d at 987 (quoting RESTATEMENT (SECOND) TORTS, § 867, cmt. c). Following this reasoning in *Baker v. Burlington N., Inc.*, we found the disclosure of a recent criminal conviction in an employee record was not a disclosure of private facts. 99 Idaho at 692, 587 P.2d at 833. The element of "legitimate public concern" was also discussed more recently by this Court in *Hoskins v. Howard*, 132 Idaho 311, 971 P.2d 1135 (1998). In *Hoskins*, the plaintiffs brought an action for invasion of privacy against their neighbors for intercepting, listening, recording, and disclosing their cordless telephone conversation. *Id.* at 316, 971 P.2d at 1140. The defendants argued, in part, that the conversation was a matter of public concern since it involved a potential murder plot. *Id.*, 971 P.2d at 1140. We speculated that neither *K.T.V.B.*, nor *Baker*, directly support the assertion that alleged, but uncharged, criminal activities are of public concern. *Id.* at 316, n.2, 971 P.2d at 1140, n.2.

In determining what is a matter of legitimate public interest:

> account must be taken of the customs and conventions of the community; and in the last

> analysis what is proper becomes a matter of the community mores. The line is to be drawn when the publicity ceases to be the giving of information to which the public is entitled, and becomes a morbid and sensational prying into private lives for its own sake, with which a reasonable member of the public, with decent standards, would say that we had no concern.

RESTATEMENT (SECOND) TORTS § 652D cmt.h (1976). This newsworthiness test "properly restricts liability for public disclosure to the extreme case, thereby providing the breathing space needed by the press." *Ozer*, 940 P.2d at 378-79 (quoting *Gilbert*, 665 F.2d at 308). *See also Virgil v. Time, Inc.*, 527 F.2d 1122, 1129 (9th Cir. 1975).[4] As a refinement of the RESTATEMENT's test for newsworthiness, many courts additionally assess whether there is a logical relationship or nexus, or lack thereof, between the events or activities that brought the person into the public eye and the particular facts disclosed. *See*, *e.g.*, *Shulman*, 955 P.2d at 484-85. "This approach . . . balances the public's right to know against the plaintiff's privacy interest by drawing a protective line at the point the material revealed ceases to have any substantial connection to the subject matter of the newsworthy report." *Id.* We agree these are relevant considerations to be analyzed in determining whether the publication of the Dir Statement, including Uranga's name, was a matter of legitimate public concern.

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[4] The question left open is whether the newsworthiness argument can be applied to information contained in court records after *Cox Broadcasting*. Because of the broad protection provided, the Supreme Court clearly feels matters in the public record are almost always of legitimate interest. Therefore, when a case involves any type of public record it will be a unique case, such as this one, where the newsworthiness test will even be applied. However, even a limited application of the newsworthiness test after *Cox Broadcasting* has been widely criticized. *See Montesano v. Donrey Media Group*, 668 P.2d 1081, 1088 (Nev. 1983); *Romaine v. Kallinger*, 537 A.2d 284 (N.J. 1988); *Rawlins v. Hutchinson Publishing Co*, 543 P.2d 988 (Kan. 1975).

The Ninth Circuit has found the jury may, in some circumstances, determine newsworthiness according to the mores of the community. *Virgil*, 527 F.2d at 1130. The court in *Virgil* recognized, however, that it is the function of the court to ascertain whether a jury question is presented. *Id.*

> [T]he function of the court on motion for summary judgment is to decide whether, on the record, reasonable minds could differ. If in the judgment of the court reasonable minds could not differ, and the answer on which reasonable minds agree favors invocation of the privilege, then summary judgment for [the newspaper] would be appropriate.

Id. at 1131. The Ninth Circuit in *Virgil* recognized the importance in requiring a judge to make a threshold determine [sic] on whether a jury question exists, stating that:

> When civil cases may have a chilling effect on First Amendment rights, special care is appropriate. Thus, a judicial examination at [the summary judgment stage] of the proceeding, closely scrutinizing the evidence to determine whether the case should be terminated in the defendant's favor, provides a buffer against possible First Amendment interferences.

Id. at 1130 (quoting *Guam Federation of Teachers, Local 1581, A.F.T. v. Ysrael*, 492 F.2d 438, 441 (9th Cir. 1974).

See also, NY Times v. Sullivan, 376 U.S. 254, 285 (1964). We find that reasonable minds could differ on whether the publication of the Dir Statement is a matter of legitimate public concern; therefore, summary judgment is inappropriate.

In addition to asserting an absolute constitutional and fair report privilege to publish the Dir Statement, the *Statesman's* Motion for Summary Judgment attacks both the claim for invasion of privacy by intrusion and for publication of private facts on the grounds that the statement [sic] concerning Uranga were public, not private facts, because they were in a court file. "To establish a claim for public disclosure of private facts or intrusion into solitude or seclusion, the areas intruded upon must be, and be entitled to be, private." *Hoskins v. Howard*, 132 Idaho 311, 317, 971 P.2d 1135, 1141 (citing *O'Neil v. Schuckardt*, 112 Idaho 472, 477, 733 P.2d 693, 698 (1986)). Uranga must have a subjective expectation of privacy in the statement, which society is willing to accept as reasonable. *Id.* The district court's grant of summary judgment does not specifically address this issue, but implicitly found Uranga failed to establish a legitimate expectation of privacy because the Dir Statement was contained in a court file. However, construing the record liberally in favor of Uranga, and drawing all inferences in his favor, we find reasonable people could reach different conclusions from the evidence in determining whether Uranga has a legitimate expectation of privacy in a statement regarding his sexuality contained in a forty-year-old court file. Uranga has also presented evidence establishing genuine issues of disputed material fact on the other elements of a claim for invasion of privacy by intrusion. Therefore, we find the district court erred in granting summary judgment to the

Statesman on Uranga's claims for invasion of privacy by publication of private facts, and invasion of privacy by intrusion.

2. *Intentional infliction of emotional distress.*

The district court dismissed the cause of action for intentional infliction of emotional distress based on its dismissal of Uranga's invasion of privacy claims. The district court relied on Ninth Circuit precedent stating that "[a]n emotional distress claim based on the same facts as an unsuccessful libel claim cannot survive as an independent cause of action." *Sworkin v. Hustler Magazine, Inc.*, 867 F.2d 1188, 1192-93, n.2 (9th Cir. 1989) (quoting *Leidhold v. L.F.P., Inc.*, 860 F.2d 890, 893 n.4 (9th Cir. 1988). It is true that a privileged publication by the press retains its protected status, regardless of the label selected by the plaintiff for his cause of action; however, because the *Statesman's* claim of constitutional and fair report privilege fail, [sic] the claim for emotional distress cannot be dismissed on this basis. Because we find genuine issues of material fact exist regarding Uranga's claim for intentional infliction of emotional distress, summary judgment on this claim was also inappropriate.

IV.

CONCLUSION

The district court's grant of summary judgment on Uranga's claims for invasion of privacy by intrusion, invasion of privacy for publication of private facts, and intentional infliction of emotional distress is vacated and the case is remanded for further proceedings consistent with this opinion. We award costs to the appellant.

Justice [sic] WALTERS, KIDWELL, EISMANN and Justice Pro Tem BURDICK, **CONCUR.**

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 25162

FRED URANGA, **Plaintiff-Appellant,** **v.** **FEDERATED PUBLICATIONS, INC., dba THE IDAHO STATESMAN,** **Defendant-Respondent**	**2000 Opinion No. 52** **Filed: August 2, 2000** **Frederick C. Lyon, Clerk**

Appeal from the District Court of the Fourth Judicial District, State of Idaho, Ada County. Hon. D. Duff McKee, District Judge.

Summary judgment dismissing action for invasion of privacy and infliction of emotional distress, *affirmed.*

John L. Runft, Boise, for appellant.

Givens Pursley, LLC, Boise, for respondent, Debora K. Kristensen argued.

LANSING, Judge

In 1995, *The Idaho Statesman,* a daily newspaper published in Boise, printed an article that included a photograph of a nearly forty-year-old handwritten statement given to police by an individual who was then under investigation. The statement named plaintiff Fred Uranga as a party to homosexual activity. Uranga sued the newspaper's publisher, Federated Publications, Inc. (hereinafter referred to as the Statesman), claiming that the publication of these allegations about him constituted a tortious invasion of privacy and intentional or reckless infliction of emotional distress. The district court granted summary judgment to the Statesman after determining that the First Amendment of the United States Constitution protected the newspaper from liability. Uranga appeals from that decision.

I.

BACKGROUND

In late 1955, three men were arrested by Boise police for participating in sexual acts involving boys. These arrests began the so-called "Boys of Boise"[1] investigation, during which 1,500 witness interrogations and sixteen arrests took place. One of the men questioned by police was Melvin Dir. During his questioning, Dir wrote a statement implicating F.J., the teenage son of a Boise city councilman, in alleged homosexual acts. The Dir statement described a sexual encounter between Dir and F.J. and a subsequent conversation in which F.J. allegedly mentioned an affair that he had with his cousin, Fred Uranga. Dir ultimately was convicted of the infamous crime against nature. However, neither Uranga nor F.J. was ever charged with any crime in connection with the Boys of Boise investigation.

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[1] The term "Boys of Boise" derives from the title to a book about the events written by John Gerassi and published in 1966.

Nearly forty years later, the Statesman published a multi-page article about the Boys of Boise episode and the destructive impact that the anti-homosexual sentiment had had on F.J.'s life.[2] The article was published during the course of public debate on a proposed ballot initiative that would have limited the rights of homosexuals in Idaho. The article described the Boys of Boise investigation as "one of the nation's most infamous homosexual witch hunts" and was presented as a reminder of "the damage done to innocent people in a climate of mob rule and fear." According to the Statesman, the article was published as "a cautionary tale."

In doing research for the article, a reporter found the original, handwritten Dir statement in a court file related to Dir's prosecution. The Statesman article itself did not refer to Uranga by name. Nonetheless, the story included a photograph of Dir's handwritten statement in which Dir's allegation about Uranga could be read.[3]

Two weeks after publication of the article, Uranga wrote a letter to the Statesman denying the allegations of the Dir statement and requesting that the newspaper correct the alleged misstatement. The Statesman declined to do so but instead offered to publish Uranga's comments in a "Speaker's Corner" feature on the editorial page. In the alternative, the Statesman told Uranga that it would publish an explanation regarding the Dir statement along with a statement that the newspaper did not have an opinion as to the veracity of the Dir allegations. Uranga did not accept either offer.

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[2] F.J. was expelled from West Point Academy after the allegations surfaced. Several years later, he committed suicide.

[3] According to the Statesman, this was not unintentional or an oversight; newspaper staff printed the photograph of the Dir statement with awareness that Uranga's name would be decipherable.

Uranga subsequently filed a complaint alleging that through publication of the photo of the Dir statement, the newspaper had invaded his privacy and intentionally or recklessly inflicted emotional distress. The Statesman moved for summary judgment on the ground that it was sheltered from liability by the First Amendment's guarantee of freedom of the press. The district court granted the Statesman's motion, relying upon a United States Supreme Court decision, *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), which applied a First Amendment privilege to the publication of information derived from court documents.

In this appeal, Uranga contends that the district court made an overbroad application of *Cox Broadcasting* and that the publication of which he complains was not protected by the First Amendment because the Dir statement was not utilized in an official proceeding, was not true, and through the passage of time had become unnewsworthy.

II.

ANALYSIS

In an appeal from a summary judgment, we apply the same standard of review utilized by the district judge when ruling on the motion. *Friel v. Boise City Hous. Auth.*, 126 Idaho 484, 485, 887 P.2d 29, 30 (1994). Summary judgment may be entered only when "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Idaho Rule of Civil Procedure 56(c). In this case, it is not contended that there are material factual issues; the sole issue presented by the motion is one of law. Therefore, we exercise free review. *Friel, supra*; *Farm Credit Bank of Spokane v. Stevenson,* 125 Idaho 270, 272, 869 P.2d 1365, 1367 (1994).

We consider first Uranga's claim of invasion of privacy. Idaho has long recognized a cause of action in tort for invasion of privacy, which encompasses four categories:

> 1. Intrusion upon the plaintiff's seclusion or solitude; or into his private affairs.
>
> 2. Public disclosure of embarrassing private facts about the plaintiff.
>
> 3. Publicity which places the plaintiff in a false light in the public eye.
>
> 4. Appropriation, for the defendant's advantage, of the plaintiff's name and likeness.

Hoskins v. Howard, 132 Idaho 311, 316, 971 P.2d 1135, 1140 (1998); *Baker v. Burlington N., Inc.,* 99 Idaho 688, 691, 587 P.2d 829, 832 (1978); *Peterson v. Idaho First Nat'l Bank,* 83 Idaho 578, 367 P.2d 284 (1961). Uranga has asserted claims under the first three of these categories. The issue presented by the Statesman's summary judgment motion was not whether Uranga could sustain his burden to prove the elements of one or more of these common law causes of action but whether, even assuming that he could sustain his burden of proof under state law, the Statesman is nonetheless immune from liability by operation of the First Amendment, which is applied to the states through the Fourteenth Amendment.

In *Cox Broadcasting,* the United States Supreme Court held that First Amendment rights were implicated in a privacy action brought by the family of a deceased rape victim against a television station that had broadcast the victim's name. The Supreme Court weighed the privacy interests of the plaintiffs against the public interest in freedom of the press, particularly focusing on the media's role in subjecting the judicial process to public scrutiny. 420 U.S. at 491-93. In balancing these interests, the Supreme Court stated:

> . . . The commission of crime, prosecutions resulting from it, and judicial proceedings arising from the prosecutions . . . are without question events of legitimate concern to the public and consequently fall within the responsibility of the press to report the operations of government.
>
> . . . .
>
> . . . [E]ven the prevailing law of invasion of privacy generally recognizes that the interests in privacy fade when the information involved already appears on the public record. The conclusion is compelling when viewed in terms of the First and Fourteenth Amendments and in light of the public interest in a vigorous press.
>
> . . . .
>
> By placing the information in the public domain on official court records, the State must be presumed to have concluded that the public interest was thereby being served. Public records

> by their very nature are of interest to those concerned with the administration of government, and a public benefit is performed by the reporting of the true contents of the records by the media. The freedom of the press to publish that information appears to us to be of critical importance to our type of government in which the citizenry is the final judge of the proper conduct of public business. In preserving that form of government the First and Fourteenth Amendments command nothing less than that the States may not impose sanctions on the publication of truthful information contained in official court records open to public inspection.

Id. at 492-95. Accordingly, the Court held that the First and Fourteenth Amendments barred the imposition of liability upon the television station for publishing information that was found in court records.

The Idaho Supreme Court subsequently applied *Cox Broadcasting* in *Baker, supra,* to preclude an action for invasion of privacy that was based upon the disclosure of information which could be found in public records. In *Baker,* the plaintiff alleged that his right to privacy was violated by his employer's disclosure of his previous criminal record. The defendant railroad discharged Baker after it discovered that he had a criminal record, contrary to the information he had provided on his employment application. The letter of discharge was forwarded to a number of individuals, including management personnel at the railroad, the Idaho Department of Employment, and Baker's union. The Idaho Supreme Court held that the disclosure was not actionable as an invasion of privacy because the publication "was merely a recitation of a public record of Baker's recent criminal activity." 99 Idaho at 692, 587 P.2d at 833.

Uranga argues that the Dir statement published by the Statesman does not fall within the reach of the *Cox Broadcasting* and *Baker* rules for a number of reasons. First, he contends that Dir's handwritten statement was never offered or accepted as evidence in a judicial proceeding or otherwise used for an official purpose, and hence it does not qualify as a "public" document.

Uranga's position cannot be sustained. Melvin Dir was the subject of a criminal investigation at the time the statement was given to police, and the statement remained in a criminal case file, stored in the court clerk's office. Although the record before this Court does not reveal why or how the unsworn statement became part of the court file, it is undisputed that it was in the file and that the file was available for public inspection. As disclosed in the above quote from *Cox Broadcasting,* the United States Supreme Court held that the First Amendment protection extends to the publication of information already available to the public through court records. The rule suggested by Uranga – requiring the press to determine whether a particular document in a court file has been introduced into evidence or otherwise "used" in an official proceeding before publishing a story about it – would impose an arduous burden on the press that would be inimical to the public interest. Such a rule "would invite timidity and self-censorship and very likely lead to the suppression of many items that would otherwise be published and that should be made available to the public." *Cox Broadcasting,* 420 U.S. at 496.

Instead of placing the burden and risk upon the press to make such distinctions, *Cox Broadcasting* held that the burden lies upon the government to properly maintain court files, allowing only appropriate documents to be preserved there for public viewing. "If there are privacy interests to be protected in judicial proceedings, the States must respond by means which avoid public documentation or other exposure of private information." *Cox Broadcasting,* 420 U.S. at 496.[4] Hence, it was the Dir statement's presence in a court file, not the extent of its use in judicial proceedings, that cloaked its later publication with the constitutional privilege.

Uranga next argues that the First Amendment privilege attaches only to the publication of truthful information contained in a court document. He argues that because the information about him in the Dir statement was false, the Statesman cannot avoid liability by invoking *Cox Broadcasting.* He directs us to language such as the following from that opinion: "[T]he First and Fourteenth

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[4] This was reiterated in *Florida Star v. B.J.F.,* 491 U.S. 524, 534, (1989), where the Court commented:

> To the extent sensitive information is in the government's custody, it has . . . power to forestall or mitigate the injury caused by its release. The government may classify certain information, establish and enforce procedures ensuring its redacted release, and extend a damages remedy against the government or its officials where the government's mishandling of sensitive information leads to its dissemination. Where information is entrusted to the government, a less drastic means than punishing truthful publication almost always exists for guarding against the dissemination of private facts.

Id. at 534.

Amendments command nothing less than that the States may not impose sanctions on the publication of *truthful information* contained in official court records open to public inspection," 420 U.S. at 495 (emphasis added), and "Once *true information* is disclosed in public court documents open to public inspection, the press cannot be sanctioned for publishing it." *Id.* at 496 (emphasis added).

We are able to find other language in the *Cox Broadcasting* opinion which, contrary to Uranga's argument, seems to focus upon the accuracy of the report rather than the truthfulness of the court file's contents, *e.g.*, "the First and Fourteenth Amendments will not allow exposing the press to liability for truthfully publishing information released to the public in official court records." *Id.* at 496. Nonetheless, we think it clear that the Supreme Court in *Cox Broadcasting* did not intend to address whether the First Amendment shield extended to accurate reports of untruthful information contained in public records. The Court emphasized that its opinion was narrow in scope, limited to the issue raised by the particular facts before it, which involved the accurate publication of true information derived from judicial records open to the public. *Id.* at 491.[5] The United States Supreme Court's more recent

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[5] Subsequent Supreme Court decisions have not been consistent in their characterization of the *Cox Broadcasting* holding. *Compare Connick v. Myers*, 461 U.S. 138, 143 n.5 (1983) (describing *Cox Broadcasting* as holding that an "action for invasion of privacy cannot be maintained when the subject matter of the publicity is matter of public record.") and *Nixon v. Warner Communications*, 435 U.S. 589, 609 (1978) (commenting that *Cox Broadcasting* "affirmed the right of the press to publish accurately information contained in court records open to the public.") with *New York v. Ferber*, 458 U.S. 747, 759 n.10 (1982) (saying *Cox Broadcasting* and *Smith* "only stand for the proposition

(Continued on following page)

decisions in this arena, *Florida Star v. B.J.F.*, 491 U.S. 524 (1989); *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97 (1979); *Oklahoma Publ'g Co. v. Oklahoma County Dist. Court*, 430 U.S. 308 (1977), also involved the publication of truthful information obtained from public sources and therefore do not directly resolve the issue raised by Uranga.

In our view, however, the underlying policy expressed in *Cox Broadcasting* and its progeny calls for a rejection of Uranga's contention that the press may be subject to liability for accurately reporting the untruthful content of court records. A rule that the press must independently verify all allegations found in a court record before publishing the information would create the sort of chilling effect on press coverage that the United States Supreme Court has consistently admonished against. The press's role to keep the public apprised of the court system's operations includes notifying the public of criminal charges made against members of the community. By following the accused through the criminal process, the press offers the general public a window into the justice system, a window from which the community can track the law enforcement, prosecutorial and judicial operations, through the ultimate disposition of the charges. If only *truthful* information were protected, the press would risk liability for reporting that a person had been accused of a crime, as the truth of the accusation would not be known until after trial.

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that if a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information. . . .").

Uranga also seeks to distinguish *Cox Broadcasting* on the basis of the age and newsworthiness of the information in the court record. He argues that even if information is initially public because of its inclusion in a court file, it can return to private status with the passage of time. Uranga maintains that the lapse of nearly forty years between the filing of the Dir statement and its publication in the Statesman dissipated any possible newsworthiness and effectively removed the information about him from the public domain.

In support of his position, Uranga relies upon a line of California cases, including *Briscoe v. Reader's Digest Ass'n, Inc.,* 483 P.2d 34 (Cal. 1971) and *Melvin v. Reid,* 297 P. 91 (Cal. 1931). In these cases, when addressing claims for invasion of privacy based upon the publication of historic information about an individual, the California courts engaged in a "newsworthiness" test. This test focuses upon the social value of the facts published, the depth of the intrusion into the plaintiff's private affairs, the extent to which the party voluntarily acceded to a position of public notoriety, the nature of the state's interest in preventing the disclosure, and whether the information is a matter of public record.

We note, however, that a number of other courts have questioned the continued viability of the *Briscoe* and *Melvin* line of cases because they pre-dated *Cox Broadcasting. See, e.g., Rawlins v. Hutchinson Publ'g Co.,* 543 P.2d 988, 995 (Kan. 1975) ("*Cox,* as we read it, would surely dictate a different result in both *Melvin* and *Briscoe.*"); *Montesano v. Donrey Media Group,* 668 P.2d 1081, 1088 (Nev. 1983) (noting that *Briscoe* was issued before *Cox Broadcasting*); *Romaine v. Kallinger,* 537 A.2d 284, 295 (N.J. 1988) ("[W]e do not believe that *Briscoe* can endure as a viable precedent in light of the absolute privilege to report matters in public court records determined in *Cox Broadcasting* . . . . "). *See also Shulman v. Group W. Prod., Inc.,* 955 P.2d 469, 500 (Cal. 1998) (Kennard, J., concurring) ("I doubt that the holding[ ] of [*Briscoe*] . . . survived the high court's holding in *Cox Broadcasting*. . . . I do question whether the publication of private facts can be prohibited on the basis of the perceived newsworthiness of the facts without creating a conflict with current First Amendment doctrine.").

In *Montesano,* the question of applying a newsworthiness standard arose because the action was based upon a newspaper article about a hit-and-run accident twenty years earlier in which a police officer had been killed. The article identified Montesano as a passenger in the automobile that collided with the officer's motorcycle. It noted that Montesano, as well as the driver of the car, had fled the scene of the accident, and that Montesano was adjudicated as a juvenile delinquent. The reference to the incident was part of a story recounting the history of law enforcement officers who had lost their lives in the line of duty. The story related the specifics of Montesano's involvement in the hit-and-run as well as his later conviction for possession of marijuana. The Nevada Supreme Court rejected Montesano's argument that even though the information from the story was drawn from court records, the lapse of twenty years between the incident and the publication eroded the public nature of those facts. The Court concluded that because all the information disclosed was contained in public records, the First Amendment protected the publisher from liability even though the publication occurred twenty years after the reported incident. *Montesano,* 668 P.2d at 1088.

In *Romaine,* an invasion of privacy action was brought against the author and publisher of a book detailing an eight-year-old criminal episode in which the plaintiffs were victims. The plaintiffs contended that the defendants should not be entitled to claim a privilege because of the lapse of time between the crimes and the publication. The Supreme Court of New Jersey disagreed, noting that *Cox Broadcasting* does not suggest that the privilege to publish matters contained in public records is limited if the events are not contemporaneous or recent. *Romaine,* 537 A.2d at 293.

We likewise conclude that a rule allowing liability for the publication of a court record, based solely upon the passage of time, would not be consistent with *Cox Broadcasting* where the Supreme Court said:

> At the very least, the First and Fourteenth Amendments will not allow exposing the press to liability for truthfully publishing information released to the public in official court records .... Once true information is disclosed in public court documents open to public inspection, the press cannot be sanctioned for publishing it. In this instance as in others reliance must rest upon the judgment of those who decide what to publish or broadcast.

Cox Broadcasting, 420 U.S. at 496.

We are not without sympathy for Uranga's position. A price has been visited upon him for the Statesman's exercise of its First Amendment rights. The notion of a newsworthiness or staleness test is appealing to permit redress for truly gratuitous intrusions on individual privacy. The flaw in that notion, however, is that such a standard could only be applied on a case-by-case basis with outcome uncertainty and would result in the sort of self-censorship by the press that *Cox Broadcasting* sought to prevent. We are reminded of the words of Chief Justice Burger in *Miami Herald Publ'g Co. v. Tornillo,* 418 U.S. 241, 256 (1974), "A responsible press is an undoubtedly desirable goal, but press responsibility is not mandated by the Constitution and like many other virtues it cannot be legislated."

As his final issue on appeal, Uranga argues that even if his invasion of privacy claims cannot stand, summary judgment should not have been granted on his claim for intentional or reckless infliction of emotional distress. We conclude, however, that a privileged publication by the press retains its protected status, regardless of the label selected by the plaintiff for his cause of action. *See Dworkin v. Hustler Magazine, Inc.,* 867 F.2d 1188, 1193 (9th Cir. 1989). Accordingly, Uranga's claim for infliction of emotional distress was subject to dismissal on the same basis as the claims for invasion of privacy.

III.

CONCLUSION

The imposition of liability upon the Statesman for publication of the Dir statement, which was found in a public court file, would be violative of the First Amendment. Accordingly, the district court's order of summary judgment, dismissing Uranga's action, is affirmed. Costs on appeal are awarded to respondent pursuant to I.A.R. 40.

Chief Judge PERRY and Judge SCHWARTZMAN **CONCUR**.

APPENDIX C

orders on review and on rehearing:

Idaho Court of Appeals: Order Denying Petition For Rehearing .... App. 56

Idaho Supreme Court: Order Granting Petition For Review .... App. 57

Idaho Supreme Court: Order Granting Petition For Rehearing, Order Granting Application To Appear Amicus Curiae by The Associated Press, et al., and by The Boise Metro Chamber of Commerce, et al. .... App. 60

Idaho Supreme Court: Order Denying Petition For Rehearing .... App. 62

In the Supreme Court of the State of Idaho

FRED URANGA,)
Plaintiff-Appellant,) ORDER DENYING
) PETITION FOR
v.) REHEARING
)
FEDERATED PUBLICATIONS,) NO. 27118
INC., DBA THE IDAHO) Ref. No. 02RH-8
STATESMAN,)
)
Defendant-Respondent.)

The Appellant having filed a PETITION FOR REHEARING on March 7, 2003 and supporting BRIEF on March 25, 2003 of the Court's Opinion released February 14, 2003; therefore, after due consideration,

IT IS HEREBY ORDERED that Appellant's PETITION FOR REHEARING be, and hereby is, DENIED.

DATED this 14th day of April 2003.

By Order of the Supreme Court

/s/ Frederick C. Lyon
Frederick C. Lyon, Clerk

cc: Counsel of Record
Counsel for Amici
West Publishing
Lexis/Nexis
Goller Publishing

In the Supreme Court of the State of Idaho

FRED URANGA, Plaintiff-Appellant, v. FEDERATED PUBLICATIONS, INC., DBA THE IDAHO STATESMAN, Defendant-Respondent.	)	ORDER NO. 27118 Ref. No. 01RH-26

The following matters are pending:

1. PETITION FOR REHEARING filed July 12, 2001 and supporting MEMORANDUM filed July 26, 2001 by Respondent.
2. APPLICATION of the Boise Metro Chamber of Commerce and the Idaho Association of Commerce and Industry to appear as amicus curiae filed July 12, 2001.
3. APPLICATION TO APPEAR AS AMICUS CURIAE by the Associated Press, Association of American Publishers, Inc., Association of American University Presses, Belo Corp., Cable News Network LP, LLLP, Dow Jones & Company, Inc., Forbes Inc., Idaho Allied Dailies, Idaho Press Club, Magazine Publishers of America, Magic Valley Newspapers, Inc. dba *The Times-News*, National Geographic Society, Newspaper Association of American, the Post Company d/b/a *The Post-Register* and KIFI Television, Reader's Digest Association, Inc., Reuters America, Inc., Time Inc., TPC Holdings, Inc. d/b/a *The Lewiston Morning Tribune* and Tribune Company filed July 13, 2001.

4. MOTION FOR LIMITED ADMISSION by Peter B. Swann, an active member in good standing of the Arizona Bar filed July 16, 2001.

5. MOTION FOR LIMITED ADMISSION of David J. Bodney, an active member in good standing of the Arizona Bar filed July 16, 2001.

The Court is fully advised; therefore, good cause appearing,

IT IS HEREBY ORDERED that the PETITION FOR REHEARING be, and hereby is, GRANTED.

IT IS FURTHER ORDERED that the APPLICATION of the Boise Metro Chamber of Commerce and the Idaho Association of Commerce and Industry to appear as amicus curiae and the APPLICATION TO APPEAR AS AMICUS CURIAE by the Associated Press, et al. be, and they hereby are, GRANTED for purposes of filing an amicus brief only but not to participate in oral argument.

IT IS FURTHER ORDERED that the MOTIONS FOR LIMITED ADMISSION filed on behalf of Peter B. Swann and David J. Bodney be, and they hereby are, GRANTED and they may appear and participate in this proceeding in association with G. Richard Bevan.

IT IS FURTHER ORDERED that the Amicus Briefs shall be filed with this Court within twenty-one (21) days from the date of this Order. Appellant shall then file a brief in response to the Brief filed in support of the Petition for Rehearing and the Amici Briefs within twenty-one (21) days thereafter. Any reply brief by Respondent shall be filed fourteen (14) days after the filing of Appellant's response brief. Oral argument shall be scheduled in due course.

DATED this 9th day of July 2002.

By Order of the Supreme Court

/s/ Frederick C. Lyon
Frederick C. Lyon, Clerk

cc: Counsel of Record
Counsel for Amici

In the Supreme Court of the State of Idaho

FRED URANGA,
Plaintiff-Appellant,
v.
FEDERATED PUBLICATIONS, INC., dba THE IDAHO STATESMAN,
Defendant-Respondent.

ORDER GRANTING PETITION FOR REVIEW

NO. 25162
Ref. No. 00R-69

The Appellant having filed a PETITION FOR REVIEW on October 24, 2000, and supporting BRIEF on November 6, 2000, seeking review of the Court of Appeals Opinion issued October 2, 2000; therefore, good cause appearing,

IT IS HEREBY ORDERED that Appellant's PETITION FOR REVIEW be, and hereby is, GRANTED as to the issues presented in the appeal.

IT IS FURTHER ORDERED that Respondent shall file a BRIEF in response to the Brief filed by Appellant in Support of the Petition for Review on or before twenty-one (21) days from the date of this Order. Appellant shall file any Reply Brief within fourteen (14) days from the date of filing of Respondent's Brief.

IT IS FURTHER ORDERED that the Court of Appeals Case No. 25162 is CLOSED and Supreme Court Case No. 27118 shall be used on all future filings in this proceeding.

DATED this 19th day of December 2000.

By Order of the Supreme Court

/s/ Frederick C. Lyon
Frederick C. Lyon, Clerk

cc: Counsel of Record
District Court Clerk
District Judge Cheri C. Copsey

In the Supreme Court of the State of Idaho

No. 25162

FRED URANGA,

Plaintiff-Appellant,

v.

FEDERATED PUBLICATIONS, INC., dba THE IDAHO STATESMAN,

Defendant-Respondent.

ORDER DENYING PETITION FOR REHEARING

The Court has received and reviewed the appellant's petition and brief for rehearing. After due consideration, the petition is hereby DENIED.

IT IS SO ORDERED.

DATED This 2nd day of October, 2000.

/s/ Darrel R. Perry
Chief Judge

ATTEST: /s/ Lois Dawson
Clerk

cc: Counsel of Record

APPENDIX D

final order appealed from

Final Order and Remittitur....................................App. 63

In the Supreme Court of the State of Idaho

FRED URANGA,
Plaintiff-Appellant,
v.
FEDERATED PUBLICATIONS, INC., DBA THE IDAHO STATESMAN,
Defendant-Respondent.

REMITTITUR
NO. 27118

TO: FOURTH JUDICIAL DISTRICT, COUNTY OF A DA.

The Court having announced its Opinion on Rehearing in this cause February 14, 2003, which has now become final; therefore,

IT IS HEREBY ORDERED that the District Court shall forthwith comply with the directive of the Opinion on Rehearing, if any action is required; and

IT IS FURTHER ORDERED that costs in the amount of $183.00 are awarded to Respondent.

DATED this 14th day of April 2003.

/s/ Frederick C. Lyon
Clerk of the Supreme Court
STATE OF IDAHO

cc: Counsel of Record
District Court Clerk
District Judge

APPENDIX E

materials from the record on appeal ("R") of the Idaho Supreme Court:

Photocopy of The Statesman Article, *The Boy Most Likely*, three pages, R 00028-00030 .... App. 64

Enlarged Photocopy of the Statement of Melvin Dir from the Statesman Article, R 00010 and R 00027 .... App. 67

Photocopy of the Statesman Editorial, R 00032 .... App. 68

Transcript of the Statesman Article, *The Boy Most Likely* .... App. 69

Transcript of the Statement of Melvin Dir .... App. 86

Transcript of the Statesman Editorial .... App. 88

Pages 9, 16, and 17 of Respondent Statesman's Responses to Plaintiff's Discovery Requests, R 00090, 00097, 00098 .... App. 91

BASEBALL PLAYOFFS

ALCS ◆ GAME 4

Mariners 0
Indians 7

Seattle's big bats silenced; Cleveland win ties series 2-2

In Sports

NLCS ◆ GAME 4

Reds..............0
Braves 6

Atlanta completes sweep, earns trip back to the World Series

Weather
Nearly perfect
76°
Details, Back Page

The Idaho Statesman

Boise, Idaho

Sunday, October 15, 1995

The Boy Most Likely

Scandal cost Frank Jones a West Point degree.
His story is a cautionary tale for the gay rights debate.

Disclosure that the evils of moral perversion prevail in Boise on an extensive scale must come as a distinct and intensely disagreeable shock to most Boiseans. It seems almost incredible that any such monstrous growth could have developed in our
Three Boise Men Admit Sex Charges
Trio Confesses Crimes Involving 10 Teenage Boys
ALL MAY
9575

BOISE HIGH GRADUATE FRANK JONES (CENTER) EARNED A SPOT AT WEST POINT IN 1955. A YEAR LATER, A CONFESSION TO AUTHORITIES INVESTIGATING THE 'BOYS OF BOISE' FROM [illegible] (PRISON MUG SHOT) WOULD CHANGE JONES' ENTIRE FUTURE.

He appeared to be everything that America treasured in the straight-laced '50s: a clean-cut boy, smart, devoted to family, God and country.

"This is a good world," classmates wrote beside his photo in the Boise High yearbook that spring.

It seemed a fitting send-off for the handsome, 17-year-old son of one of Boise's most influential politicians, now bound for a coveted spot as a West Point cadet. With a U.S. Military Academy commission in hand, his future would be golden, a friend recalled wistfully. "You get to say, 'I'm an academy graduate,' and that in itself opens hundreds of thousands of doors."

But one rainy night nearly 30 years later, everything came crashing down.

At the reception desk of a nondescript Boise motel, he handed over $33 in cash, then stepped through the lobby to Room 110, and into oblivion. Reeling with an overdose of pills and booze, the now middle-aged man stood at the foot of his bed in that velvet-black room, then pitched over backward and died.

His name was Frank Anton Jones, and he was one of the "Boys of Boise" — victims of what's regarded as one of the nation's most infamous homosexual witch hunts, a scandal that began 40 years ago this month.

How he wound up in that motel room is a cautionary tale for a time when sides are being drawn again in the battle over gay rights in Idaho. It speaks of the damage done to innocent

See Tale/8A

STORY BY JIM HOPKINS & PHOTO ILLUSTRATION BY STEVE JEFFS
THE IDAHO STATESMAN

Medicare bills full of favors for providers

Doctors, hospitals, drug companies could all benefit

By Martin Gottlieb and Robert Pear
New York Times News Service

WASHINGTON — Embedded in the pages of the vast legislation to overhaul Medicare and Medicaid are provisions that would relax standards for hospitals and doctors and offer million-dollar favors for drug companies.

The legislation contains a series of narrowly focused, widely overlooked provisions that would do away with some regulations of doctors and their laboratories, reimburse private hospitals for some local taxes and [illegible] benefits potentially worth millions to manufacturers of prescription drugs and medical devices.

The legislation would [illegible] health care for millions of Americans. But in the fine print, it also serves as a vehicle for proposals pushed by segments of the health care industry, which have mobilized a small army of lobbyists to press their concerns. Republicans defend these measures, saying consumers will benefit if Congress lifts the heavy hand of federal regulation from the industry.

Democrats and consumer advocates denounce the provisions as giveaways to industry and unwarranted inducements to win support for the bills. The American Medical Association endorsed the legislation this week, saying it would expand choices for Medicare beneficiaries, after the doctors were courted by House Republican leaders that

See Medicare/Back Page

The provisions

[illegible]

In Idaho

[illegible]

Broncos hot, Bengals not as they go into big game

By Mike Prater
The Idaho Statesman

The Boise State football team has been waiting one long year to shout one simple phrase:

"Bring on the Bengals."

The long-awaited BSU-Idaho State showdown — probably the last in a memorable [illegible]-year rivalry — comes to Bronco Stadium next Saturday night.

[illegible]

Saturday's scores

Boise State	40
Weber State	14
Eastern Washington	[illegible]
Idaho	37
Montana State	[illegible]
Idaho State	[illegible]

[illegible]

Share your views

[illegible]

Inside Today

Cease-fire hopes

[illegible]

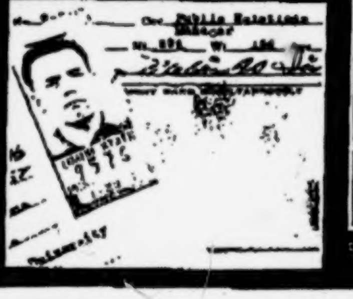
Index

[illegible]

EXHIBIT A

BEST AVAILABLE COPY

FRANK JONES WAS ONE OF ABOUT [illegible] YOUNG MEN ADMITTED TO WEST POINT DURING THE SPRING OF 1955. THIS IS HIS BOISE HIGH SCHOOL YEARBOOK PHOTO.



Tale/From 1A

people in a climate of mob rule and fear. And it illustrates a moment in history when a small Western city passed out of innocence.

• • •

The scandal began simply enough in the fall of 1955 amid complaints that adult men were propositioning teen-age boys at the YMCA. Egged on by inflammatory editorials in The Idaho Statesman — one called homosexual men a "cancerous growth" — and public pressure in the hysteria that followed, the case quickly escalated into something akin to an inquisition.

Nearly 1,400 people were interrogated, often without legal representation. Sixteen men were arrested — some for having consensual sex with other adult males — and nine were imprisoned for up to life. Some of Boise's most influential, Old Guard families were devastated overnight, and the event generated national publicity.

"It reminded me of McCarthyism," recalled Carolyn Terteling, a classmate of Frank's, and now a Boise city councilwoman. "It was humiliating."

The scandal, and Frank's involvement, is a story that many people — including his own family — don't want told.

"I think it's very foolish to bring it up again," snapped former Third District Judge Merlin S. Young, who handled the case in which Jones became entangled.

Family and friends of other victims are equally adamant, citing the anger and shame such memories revive. "It was hideous," said the sister of one defendant, her voice fairly shaking. "It was just hideous."

But others see a value in examining the abuses of 1955-56 as a way of preventing a recurrence. "We're living in a time when there certainly are right-wing elements who would like to lead new witch hunts," said Jonathan Katz, a New York historian who studied the Boise case.

Gene Thomas — who at the time was Ada County deputy prosecuting attorney, and later prosecuting attorney — says the incident has been mischaracterized over the years, however. It was, plain and simple, an orderly investigation of men having sex with boys less than 16 years old — a felony.

"That chapter in Boise's history," Thomas said recently, "is a proud chapter no matter what the homosexual community has to say."

• • •

Among those who drew Frank into the scandal, two people stand out.

One was the man who implicated him directly. The other, ironically, was Frank's own father, "Buck" Jones.

Born Harold T. Jones in Beverly, N.J., Buck moved to Idaho in 1934, when he was 21. He worked as a wool buyer, trading with the area's Basque sheepherders and marrying a member of one of that community's better-known families, the Uranges.

In the late '30s and early '40s, Buck and his wife, Juanita, lived in Rexburg, where Frank was born Oct. 13, 1937. The Joneses had one more child, a daughter, then returned to Boise, where Buck ran a men's clothing store and entered politics. He was elected to the Boise City Council in 1951, the start of nearly 20 years served — a record for any member. His name would appear on City Hall, public swimming pools and other buildings.

The man who eventually helped implicate Frank — Melvin W. Dir — was a brash member of the gay community, "gay as pink ink," recalled one acquaintance. The son of a well digger, Dir was born in Boise in 1928. He graduated from Boise High and after a couple years in college, then two Navy hitches, returned to Boise in 1953.

One hot summer night a year later, Dir would climb into his car and go for a ride around town. His life, and that of the Jones family, would never be the same again.

• • •

By now, Frank was 17 and had every reason to be on top of the world.

He'd been accepted by the nation's premier military academy, West Point, surviving a grueling qualification process requiring congressional nomination, and open to only the top 5 percent of U.S. high school grads. Perched high on a hill above the Hudson River 50 miles north of New York City, the 150-year-old institution counted among its alumni Ulysses S. Grant, Douglas MacArthur, and George S. Patton Jr.

Fellow Boise High classmates were enormously proud. "It was just one of those neat things at graduation time," recalled Richard Crostol. "'We have someone going to West Point.' I mean, wow, wow, wow."

At Boise High, Frank joined the concert and pep bands, the French Club and the drill team. And he was an officer in the school's ROTC program — an elite group who wore their uniforms to school every Friday. "It was an honor; it was a prestige-type thing," said Crostol, who was also an officer in Frank's battalion.

In a photograph taken during his senior year, a uniformed Frank beams at the camera, looking for all the world like he just stepped out of a bandbox.

He has large, expressive eyes. His hair and complexion are dark, reflecting his Basque heritage, and he has a stocky build, perhaps from his father's side.

"He was just a marvelous guy," recalled Terteling, the City Council member.

Frank had a seemingly inexhaustible sense of humor — a trait he kept throughout most of his adult life, friends said. And he liked to be at the center of the action. "He kind of made things happen," Crostol said.

Frank left for West Point around June 1955, shortly after graduation.

He wouldn't be there long, however.

• • •

Not unlike today, Boise in the '50s was a homogeneous, insular community — a state capital with just 34,000 residents, many working for government or in the service industry.

Allen Dicker arrived in 1956 with her husband, after friends in Denver sang the city's praises. The Dickers were among two dozen families transferred by Mountain Bell Telephone Co. So unusual was that sort of influx that The Statesman devoted an entire page, with photographs, to the event.

"That was a big deal," she said.

People lived mostly north of the Boise River, in and around the North and East ends. The movers and shakers worked downtown, lunched at the Arid Club, and returned in the evening to their homes in Tudor and Georgian-style mansions set on broad green lawns along Harrison Boulevard and what was already called "The Avenues" — "you didn't even have to say 'Warm Springs,'" recalled one woman.

Downtown was still the city's commercial heart in the fall of '55. [illegible] were on sale at C.C. Anderson's Department Store, Disney's "[illegible]" was playing at the Egyptian on Main. Rock 'n' roll hadn't [illegible] the [illegible] "[illegible]" was near the top of the charts. Dwight and Mamie were in the White House.

"I don't think it ever was just a small Western town in that sense of the word," Dicker said. "It was comfortable with itself and its mores and its structure. There was that kind of smugness about it."

"This was a time when no one talked about sex, much less homosexuality," said the woman whose brother was arrested. "If anyone had said the word '[illegible],' [illegible] would have fainted."

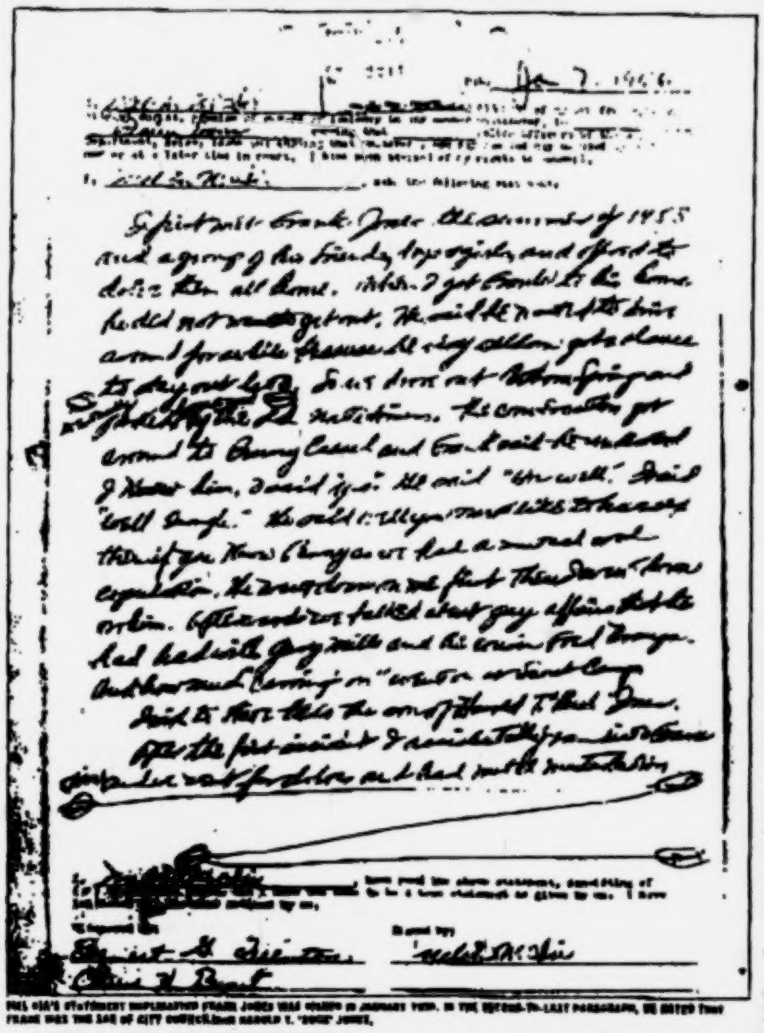
And it was just that atmosphere that left so many unprepared for the gathering storm. "It was really a remarkable situation," said Wally Hurst, one of Frank's classmates.

• • •

The scandal began in earnest late on Halloween Night with the arrests of three men: a 33-year-old [illegible] worker, a 29-year-old shoe store employee, and a 31-year-old [illegible] store clerk. Two were charged with lewd and lascivious conduct with children under 16, the third with infamous crimes against nature.

The arrests, disclosed on the front page of The Statesman, said the three had given [illegible] confessions to "immoral acts" with at least 10 teen-age boys. Even more alarming, the newspaper said a preliminary investigation showed several other adults and about 100 boys were involved in other similar activities, and more arrests were expected.

An editorial under the headline "Crush the Monster" demanded action. "Disclosure that the evils of moral perversion prevail in Boise on an unthinkable scale must come as a distinct and



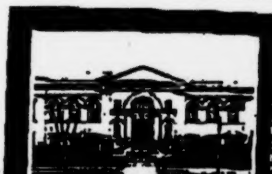
Date Jan 7. 1956.

I first met Frank Jones the summer of 1955 [illegible]

Signed by: [illegible]

MEL DIR'S STATEMENT IMPLICATING FRANK JONES WAS SIGNED IN JANUARY 1956. IN THE SECOND-TO-LAST PARAGRAPH, HE NOTED THAT FRANK WAS THE SON OF CITY COUNCILMAN HAROLD T. "BUCK" JONES.

BUCK JONES [illegible] HE SERVED ON THE BOISE CITY COUNCIL [illegible]



THE OLD CARNEGIE PUBLIC LIBRARY ON WASHINGTON STREET [illegible]

INVESTIGATORS SUSPECTED [illegible] SMOKING [illegible] CIGARETTES [illegible] MOTTO: WHEREVER PARTICULAR PEOPLE CONGREGATE.

[illegible]

[illegible] CELLHOUSE AT THE OLD STATE PENITENTIARY [illegible]

[illegible]

intensely disagreeable shock to most Boiseans.

Time magazine picked up the story, as did newspapers all along the West Coast, and the impression developed quickly that Boise harbored a vast underground network of wealthy businessmen corrupting boys by paying them for sex.

Under such pressure, and continuing news coverage of every arrest, Ada County Prosecutor Blaine F. Evans pushed ahead.

A private investigator who rooted out gays in the U.S. State Department during the McCarthy era was hired. Working out of a rented home in the North End, he began compiling lists of suspected homosexuals, then interrogated them one at a time, asking for other names. At one point, Mayor Russell E. Edlefsen said 1,472 people had been interviewed.

By December — six months after Frank had gone to West Point, and unaware of what was about to happen to his own son — Buck and the three other City Council members called for special measures to deal with "the homosexual problem," including a separate prison or jailhouse so that those arrested could receive psychiatric treatment.

They were especially critical of the job law enforcement had been doing up to that point — an assertion that came back to haunt Buck in ways he could never have imagined.

• • •

As word spread of the growing scandal and the first round of sentences, gay men — Mel Dir estimated hundreds — began to flee the area in droves.

Dir went to San Francisco, where he worked as a food checker at the Mark Hopkins Hotel. "I didn't try to hide where I'd gone," he told Katz, the historian, in 1973. "I was writing to people, and talking to people from Boise, and keeping track of what was going on. It was in every paper on the Coast; you could see it on the front page wherever you went."

Someone — apparently one of the men previously convicted — ratted on Dir. On the last day of 1955, he was charged with the infamous crime against nature — a felony — and specifically for performing oral sex on another male. His name: Frank Jones.

Days later, Ada County Sheriff C.L. "Doc" Hause and his wife drove to San Francisco to present Dir with the charge. The three of them returned to Boise, where Frank's fate was soon sealed.

• • •

At the North End house, the investigators played a tape recording — apparently made at West Point — in which Frank said Dir had forced him to have sex at gun point.

Dir denied Frank's allegations and, in a hand-written statement, told his version of what happened that hot July evening more than two years before.

At the time, the summer of 1953, Frank was nearly 16, and about to enter his junior year at Boise High. Dir was nearly 27.

He claimed he first met Frank with a group of his friends, boys and girls, and offered them all a ride home. Frank didn't want to go right away, however, "because he seldom got a chance to stay out late," Dir said.

The two drove down Warm Springs Avenue, eventually parking at the site of the old Natatorium swimming park. The conversation got around to a man named Benny Cassel — who eventually would be sentenced to 10 years in prison during the investigations — and Frank said he understood that Dir knew him.

"I said 'yes,'" Dir replied. "He said 'How well?' I said, 'well enough.' He said, well you must like to have sex then if you know Benny, as we had a mutual oral copulation."

Afterward, they talked about sexual liaisons Frank had had with a high school classmate and with a cousin — both of whom Frank identified by name, according to Dir. And he spoke of homosexual activities that had taken place at Boy Scout camp — ironically, Buck's favorite youth cause.

Dir said he and Frank met, by chance, twice again after that night, and both times engaged in sex.

Finally, so there'd be no doubt about who Frank was, Dir told the investigators: "I wish to state he is the son of Harold T. 'Buck' Jones."

• • •

Frank was summarily thrown out of West Point, apparently that spring.

Sheriff Hause had traveled to the academy and told the boy about what the authorities knew, tipping off school administrators in the process. Frank was told he'd have to come back to Boise to testify at Dir's trial. Author John Gerassi, who wrote about the scandal in his 1966 book "The Boys of Boise," said it was a calculated move to embarrass Buck — paying him back for criticizing the cops.

Dir was never tried, however, so Frank wasn't able to confirm or deny his account in court. Dir pleaded guilty, throwing himself on Judge Young's mercy. He had reason to worry: Young had sentenced one of the earlier defendants to life in prison.

But Young sentenced Dir to a five-year, withheld sentence, put him on probation, and ordered him to spend six months in the county jail.

Buck and Juanita were stunned at Frank's involvement, and the consequences, recalled family friend John Corlett. "They were deeply, deeply upset. They just had no idea about Frank . . . and they did not believe it."

In the only known interview Buck gave on the subject — with Gerassi, albeit one in which his identity was disguised — the councilman was nearly in tears.

"'It was a political witch hunt,'" Buck was quoted as saying. "'What they did to my kid was disgusting. They didn't tell me a thing. He was in West Point and in their investigation they found out that he had had a homosexual experience four years (actually three) earlier. They could have told me about it, and I would have had him brought home on an emergency leave and then we could have gone into the whole thing.'"

Buck wouldn't say why he and the council pushed so hard for the investigations in the first place. "'My son has made another career,'" Buck said. "'He's all right now. Let's leave him alone.'"

It wasn't entirely clear, however, that Frank was all right.

• • •

In 1957, Frank married Sharon Bidiman, who had been one year behind him at Boise High, and at some point they adopted two children.

They eventually relocated to Portland, where Frank worked in sales for Pennwalt Corp., a chemicals concern. It was the start of a nearly 20-year exodus from Boise.

Frank earned his bachelor's in science from Portland State University, a small institution that was a far cry from West Point. He seemed to take the changed circumstances in stride, however. "I never knew Frank to cry over spilled milk," Corlett said.

Friends don't remember Frank ever referring to West Point or the events of 1955-56; most were surprised to hear about them. "Frank didn't have those tendencies," Corlett said, sounding uncomfortable with the topic of his former buddy's sexuality.

Frank worked for Pennwalt for about 15 years, in Portland and then Philadelphia, eventually getting promoted to brand manager. "He was a consummate salesman, wheeler-dealer type," recalled a co-worker. "He really liked to be where there was lots and lots of action."

By all accounts, he seemed happy — "always moving around, always laughing, always joking." That outwardly jovial nature left friends jolted by his suicide. "It was just hard to believe," said one.

By 1979, and living in St. Louis, Frank and Sharon's marriage was in trouble. Sharon filed for divorce, although her petition was dropped by the court when she didn't pursue it. They relocated to Boise later that year, but separated soon after.

Frank suffered from depression, and family members told the police he was an alcoholic, and indicated he was under a doctor's care. The once-handsome boy was 70 pounds overweight, balding, and wore glasses and a beard.

In November 1981, he took an overdose of pills in an unsuccessful suicide attempt. On Feb. 15, 1982 — a rainy Monday at about 9 p.m., and dressed in a blue windbreaker and carrying a briefcase — he eased his aging Ford sedan into the parking lot of the Rodeway Inn, less than a mile from his West Boise apartment. An hour later, he was dead, at 44.

• • •

When the dust settled at the end of the yearlong Boys of Boise inquiry, the city concluded it didn't have a disproportionate number of gay men after all. A handful of men had indeed been having sex with boys, but some of the kids had criminal backgrounds — including one who murdered his father midway through the investigations. And there'd never been an organized homosexual ring.

Dir eventually served 18 months at the old State Penitentiary for having consensual sex with fellow inmates at the county jail while serving time for the case in which Frank was involved. Dir, who turned 69 last month, declined to be interviewed, citing concerns about his safety.

Both Thomas and his predecessor, Evans, still practice law. Thomas eventually was elected president of the American Bar Association, a position he held in 1986-87. Evans declined an interview request.

Young became a U.S. bankruptcy judge, then retired in 1984, when he was 66.

Buck died of heart failure at 88, on the eighth anniversary of Frank's suicide. Juanita died three years later, at 84.

Frank rests in Morris Hill Cemetery, within the cool shadow of a large oak tree. Buck's cremated remains were buried on his grave for a time, briefly uniting father and son after so much turmoil. But Buck's ashes were later removed and reburied on the other side of the cemetery, beside Juanita's.

Frank is alone again.

• • •

Why Frank killed himself may never be answered. He didn't leave a suicide note, and those presumably closest to him at the end — his sister, widow and children — declined to be interviewed.

What killed Frank is a more complex question, taking in possibilities that go far beyond the strictly medical causes employed by a coroner. Was it the long arm of a community's fear? Revenge? Shame?

Without a doubt, Frank's life changed dramatically when scandal cost him his West Point degree, sending his life skittering in a far different direction.

And how did the city fare?

"It probably brought Boise into the current times faster than a small community might have otherwise been brought up to speed on," said Wayne Kidwell, a former Ada County prosecuting attorney critical of the investigations.

"It's a better place," said Thomas, "by virtue of the fact that law enforcement responded in its highest tradition, and did it effectively. It's a worse place in that this awful pattern of crime against children had become part of Boise."

The former prosecutor said every effort was made to protect Frank and the other juveniles. Inevitably, however, some were hurt, Thomas said. "You know as well as I do that, practically, life is cruel at times."

Frank and his family were among those hurt.

"It's awesome to me to think that the repercussions to that occurrence are still being felt," Councilwoman Terteling said. "Like a rock in a pond; the ripples go on and on."

“ There is cultural trickling out, that it might be OK to be gay. ”

Initiative revives 'Boys' rhetoric

Some fear another morals battle ahead

By Jim Hopkins
The Idaho Statesman

The renewed battle over gay rights has led to warnings that Idaho is ripe for a repeat of the abuses seen during the Boise morals investigations 40 years ago.

Observers point to the "Family and Child Protection Act" initiative, which would limit the rights of homosexuals in Idaho, and which supporters want on the November 1996 ballot. A similar initiative was narrowly rejected by voters last year.

The new measure, which calls for the "protection of Idaho's families and young children," employs some of the rhetoric and imagery used during the "Boys of Boise" scandal of 1955-56. When the proposal was unveiled in June, for example, its authors used as a backdrop the public restrooms at Ann Morrison Park — a location similar to one targeted by investigators tracking down homosexuals during the '50s.

"If you did a little digging into what people are really thinking," said researcher Jonathan Katz, an expert on gay and lesbian history, "I think you would find the same kind of hatred — irrational hatred and fear of people who are different from them."

The leader of the initiative effort, Kelly Walton, rejects that notion, however, saying his campaign isn't a witch hunt because it doesn't target individual homosexuals. "I've never accused or slandered anyone," he said.

Walton, who is 50 and said he knows little about the original Boise case, added: "It's very interesting that society would react so swiftly and strictly back in the '50s, and now it seems like political correctness wants to celebrate sexual perversion. We've come a long way in 40 years."

The same laws protecting children from sexual abuse, and criminalizing certain sexual acts between consenting adults, remain on the books today. But observers say they wouldn't be used as a springboard for a witch hunt because Boise is a far different place now.

Like many other largely suburban and rural areas, the city is home to gays and lesbians who perhaps a decade ago wouldn't have considered living outside the urban fast lane that's traditionally attracted homosexuals.

"There is cultural trickling out, that it might be OK to be gay," said Sue Hyde, a field organizer for the National Lesbian and Gay Task Force, a leading gay rights group.

Hyde and other experts say some of the things that created middle-class, bland flight — fear of violence, economic decline, an increasingly older population fed up with taxes — explain the growing number of gays choosing to live in cities like Boise.

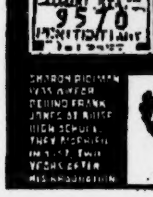
There aren't any widely accepted statistics to support this view of Gay America's suburbanization. Instead, the evidence of increasing numbers and acceptance is anecdotal.

Boise groups, for example, have sponsored an annual gay pride parade through downtown that would have been unthinkable 40 years ago. The first year, 1990, the event drew 300 participants; this past summer there were about 900.

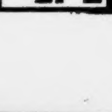
And The Idaho Statesman, which in 1955 held a distinctly anti-gay editorial stance, last year was a vocal opponent of legislation widely viewed as anti-gay.

The city's official relationship with its gay residents remains at least unclear, however.

Mayor Brent Coles, who was 3 years old and living in Idaho Falls in 1956, spoke of Boise's "civility and tolerance" when asked if gay people were welcome in the city. "No special rights, but no lack of civil rights for any population, including gays," he said, hastening to add: "We do not tolerate child abuse."



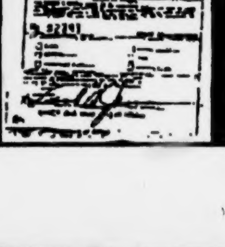
ONE OF THE MOST PROMINENT DEFENDANTS IN THE MORALS INVESTIGATIONS WAS JOE MILLER (LEFT), A VICE PRESIDENT AT IDAHO FIRST NATIONAL BANK, PREDECESSOR OF WEST ONE. MILLER, [illegible], WAS CONVICTED OF [illegible] WITH [illegible] [illegible] MONTHS AT THE OLD STATE PENITENTIARY.



SHARON BIDIMAN WAS A YEAR BEHIND FRANK JONES AT BOISE HIGH SCHOOL. THEY MARRIED IN 1957, TWO YEARS AFTER HIS GRADUATION.

MAYOR RUSSELL EDLEFSEN [illegible]

FRANK JONES SIGNED HIS NAME FOR THE LAST TIME WHEN HE REGISTERED FOR A [illegible] AT THE RODEWAY INN [illegible] AN HOUR BEFORE HE DIED IN A SUICIDE.



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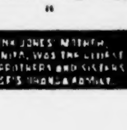
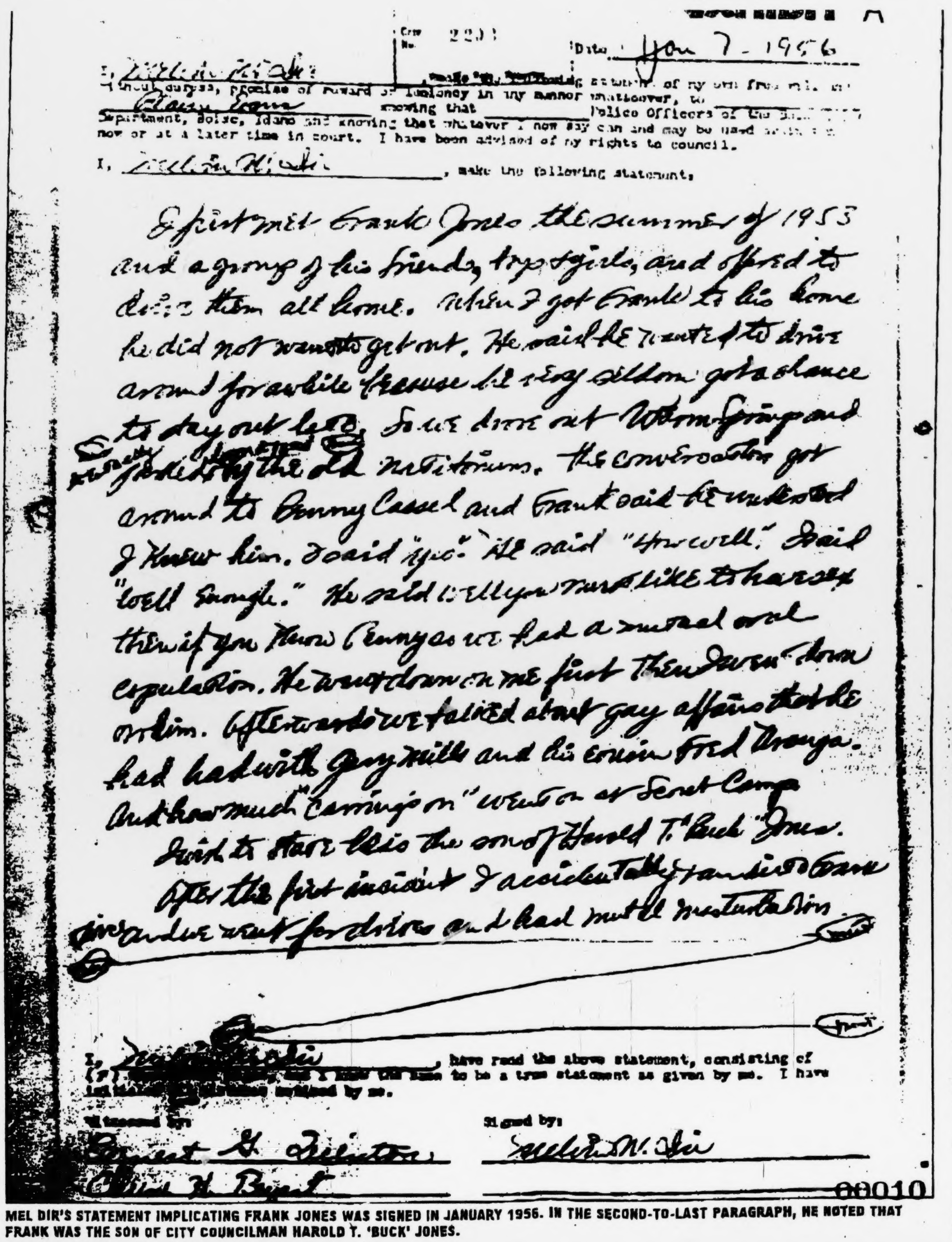


Juanita [illegible] Jones

FRANK JONES' MOTHER, JUANITA, WAS THE OLDEST OF [illegible] BROTHERS AND SISTERS IN BOISE'S [illegible] FAMILY.

FRANK JONES COMMITTED SUICIDE IN 1982, THREE YEARS AFTER RETURNING TO BOISE, AND WAS BURIED IN MORRIS HILL CEMETERY.

App. 66



Case No. 220[illegible]

Date Jan 7 - 1956

I, Melvin Dir, [illegible] statement of my own free will, without duress, promise of reward or leniency in any manner whatsoever, to Glenn Evans knowing that ______ Police Officers of the [illegible] Department, Boise, Idaho and knowing that whatever I now say can and may be used against me now or at a later time in court. I have been advised of my rights to council.

I, Melvin Dir, make the following statement,

I first met Frank Jones the summer of 1953 and a group of his friends boys & girls, and offered to drive them all home. When I got Frank to his home he did not want to get out. He said he wanted to drive around for a while because he very seldom gets a chance to stay out late. So we drove out Warm Springs and parked by the old natatorium. The conversation got around to Benny Cassel and Frank said he understood I knew him. I said "yes." He said "How well." I said "well enough." He said well you must like to have sex then if you know Benny as we had a mutual oral copulation. He went down on me first then I went down on him. Afterwards we talked about gay affairs that he had had with Gary Mills and his cousin Fred Branga. And how much "carrying on" went on at Scout Camp.

I wish to state he is the son of Harold T. "Buck" Jones.

After the first incident I accidentally ran into Frank since and we went for drives and had mutual masturbation.

I, Melvin Dir, have read the above statement, consisting of (1) [illegible] and I know the same to be a true statement as given by me. I have [illegible] initialed by me.

Witnessed by: [illegible]

Signed by: Melvin N. Dir

00010

MEL DIR'S STATEMENT IMPLICATING FRANK JONES WAS SIGNED IN JANUARY 1956. IN THE SECOND-TO-LAST PARAGRAPH, HE NOTED THAT FRANK WAS THE SON OF CITY COUNCILMAN HAROLD T. 'BUCK' JONES.

Mon.-Fri., 9 a.m. to 5 p.m. EST.
Sen. Larry Craig: United States Senate, Washington, D.C. 20510. Phone 202-224-2752, FAX 202-224-2573 D.C. In Boise: 304 N. 8th St., Room 149, Boise, ID, 83702. Phone 208-342-7985, FAX 208-343-2458, E-Mail
larry(underscore)craig@craig.senate.gov
Sen. Dirk Kempthorne: United States Senate, Senate Dirksen Building, Washington, D.C. 20510. Phone 202-224-6142, FAX 202-224-5893 D.C. In Boi-
kempthorne@kempthorne.senate.gov
Rep. Helen Chenoweth: U.S. House of Representatives, 1719 Longworth House Office Building, Washington, D.C. 20515. Phone 202-225-6611. In Boise: 304 N. 8th St., Room 454, Boise, ID 83702. Phone 208-336-9831, FAX 208-336-9891.
Rep. Mike Crapo: U.S. House of Representatives, Washington, D.C. 20515. Phone 202-225-5531, FAX 202-225-8216 D.C. In Boise: 304 N. 8th St., Suite 325, Boise, ID 83702. Phone 208-334-1953, FAX 208-334-9533.

city. The Jones family never recovered from the events of that year, and those of us who cared, and still care, couldn't help.

The ultimate goal of the system is justice. The laws invoked by the county in 1955 in connection with the "Boys of Boise" were (and still are) there to pro-

news commentary and intemperate editorials in the Statesman (admittedly, then under different ownership). In retrospect, the stories were fed by the political ambitions of certain members of Ada County government, who later violated Frank's privacy and caused his improper and public removal from West

hysteria that was generated, principles of justice and fairness were disregarded. Last year's Proposition One initiative had the ingredients for a replay, but reason prevailed.

Neal Newhouse of Boise has served as president of the Boise School Board and prosecuting attorney of Camas County.

How to reach Boise city representatives

Want to share suggestions, applause or gripes with City Hall? Call the City Hall 24-hour hotline at 384-4404. Or write to Box 500, Boise, ID 83701.

How to get involved at The Idaho Statesman

News meetings held daily at 10 a.m. and at 4 p.m. are open to the public.

The editorial board invites a local resident to be a member and attend all meetings and discussions with the editorial board.

If you would like to be involved, call Executive Editor John Costa at 377-6400.

FROM THE EDITOR

'Boys of Boise' saga may help someone today do the right thing

We published a very difficult, sensitive story last week.

We intended it as a cautionary tale for times when emotions lead to hysteria, when the great commonsense center of our society is overwhelmed by the fringe.

The story is the one about Frank Jones, a prodigal son of long-lost Boise, who got chewed up in the anti-gay hysteria of the 1950s called "The Boys of Boise."

It was a pretty sorry period in the city's history, a time when rumors and suspicions spread that Boise was the center of huge ring of men preying on young boys. Nearly all of it was hogwash.

John Costa

As it always does, the cleansing crusade got wrapped up in virtue. Prosecutors said they were simply enforcing a law that most of us commend: Taking advantage of children is wrong and is rightfully punishable regardless of sexual orientation.

We all applaud this law, when in the hands of prosecutors and judges thoughtfully sifting hard evidence of individual guilt. But a widespread ring of men preying on boys? It just didn't exist.

As it always does, the hysteria eventually subsided.

Also, as it always does, the desperate pain of those accused, or simply rumored about, lingered and lingered.

Frank Jones, a West Point cadet, withdrew from the academy, went on to marry and to have children, and then to commit suicide.

The story generated a number of calls at The Statesman.

No one said we got anything wrong, but most said they simply did not want to read about that painful period again for any reason. Nearly everyone expressed sympathy for the surviving members of the Jones family.

It is that group that I am most sorry for.

I thought a lot about them before we published. But, in the painful tradition of hard choices that editors face, I concluded that there was a potential public good that justified the understandable anguish we caused this family.

These decisions aren't easy. Like publishing the details of an adolescent suicide in a warning story to parents, or the age-old story of a lynching victim in a civil rights story, you weigh the pain you know you are about to cause against the good you might do.

In this case, my hope is very specific.

I hope that by reading this story, and by understanding the pain that hysterical undertakings can cause, residents of Idaho will turn their backs on a second attempt to pass an anti-gay constitutional proposition.

This hope is not born of an academic or speculative concern.

The voters turned their backs on Proposition One in 1994. Now backers are seeking signatures to get it on the ballot in November 1996.

Even if, as it now seems likely, the United States Supreme Court will throw out all such rubbish, the mood of our democracy can turn ugly.

Efforts such as the one under way paint that ugliness.

As painful as it is to remember, Frank Jones shouldn't be forgotten.

And if our story causes one person to refuse the pen of the petitioner, then his legacy is validated.

John Costa is the executive editor of The Idaho Statesman.

EXHIBIT C

[Transcript of Article]

The Idaho Statesman

Boise, Idaho Sunday, October 15, 1995

The Boy Most Likely

Scandal cost Frank Jones a West Point degree.

His story is a cautionary tale for the gay rights debate.

STORY BY JIM HOPKINS ❖ PHOTO ILLUSTRATION BY STEVE JEFFS

The Idaho Statesman

[All Pictures And Captions Omitted In Printing]

He appeared to be everything that America treasured in the straight-laced '50s: a clean-cut boy, smart, devoted to family, God and country.

"This is a good world," classmates wrote beside his photo in the Boise High yearbook that spring.

It seemed a fitting send-off for the handsome, 17-year-old son of one of Boise's most influential politicians, now bound for a coveted spot as a West Point cadet. With a U.S. Military Academy commission in hand, his future would be golden, a friend recalled wistfully. "You get to say, 'I'm an academy graduate,' and that in itself opens hundreds of thousands of doors."

But one rainy night nearly 30 years later, everything came crashing down.

At the reception desk of a no-frills Boise motel, he handed over $33 in cash, then staggered through the lobby to Room 119, and into oblivion. Reeling with an overdose of pills and booze, the now-suicidal man stood at the foot of his bed in that velvet-black room, then pitched over backward and died.

His name was Frank Anton Jones, and he was one of the "Boys of Boise" – victims of what's regarded as one of the nation's most infamous homosexual witch hunts, a scandal that began 40 years ago this month.

How he wound up in that motel room is a cautionary tale for a time when sides are being drawn again in the battle over gay rights in Idaho. It speaks of the damage done to innocent people in a climate of mob rule and fear. And it illustrates a moment in history when a small Western city passed out of innocence.

•••

The scandal began simply enough in the fall of 1955 amid complaints that adult men were propositioning teenage boys at the YMCA. Egged on by inflammatory editorials in The Idaho Statesman – one called homosexual men a "cancerous growth" – and public pressure in the hysteria that followed, the case quickly escalated into something akin to an inquisition.

Nearly 1,500 people were interrogated, often without legal representation. Sixteen men were arrested – some for having consensual sex with other adult males – and nine were imprisoned for up to life. Some of Boise's most influential, Old Guard families were devastated overnight, and the event generated national publicity.

"It reminded me of McCarthyism," recalled Carolyn Terteling, a classmate of Frank's, and now a Boise city councilwoman. "It was bloodletting."

The scandal, and Frank's involvement, is a story that many people – including his own family – don't want told.

"I think it's very foolish to bring it up again," snapped former Third District Judge Merlin S. Young, who handled the case in which Jones became entangled.

Family and friends of other victims are equally adamant, citing the anger and shame such conversations revive. "It was hideous," said the sister of one defendant, her voice fairly shaking. "It was just hideous."

But others see a value in examining the abuses of 1955-56 as a way of preventing a reoccurrence. "We're living in a time when there certainly are right-wing elements who would like to lead new witch hunts," said Jonathan Katz, a New York historian who studied the Boise case.

Gene Thomas – who at the time was Ada County deputy prosecuting attorney, and later prosecuting attorney – says the incident has been mischaracterized over the years, however. It was, plain and simple, an orderly investigation of men having sex with boys less than 16 years old –a felony.

"That chapter in Boise's history," Thomas said recently, "is a proud chapter no matter what the homosexual community has to say."

•••

Among those who drew Frank into the scandal, two people stand out.

One was the man who implicated him directly. The other, ironically, was Frank's own father, "Buck" Jones.

Born Harold T. Jones in Beverly, N.J., Buck moved to Idaho in 1924, when he was 21. He worked as wool buyer, trading with the area's Basque sheepherders and marrying a member of one of that community's better-known families, the Urangas.

In the late '30s, and early '40s, Buck and his wife, Juanita, lived in Rexburg, where Frank was born Oct. 13, 1937. The Joneses had one more child, a daughter, then returned to Boise, where Buck ran a men's clothing store and entered politics. He was elected to the Boise City Council in 1951, the start of nearly 20 years served – a record for any member. His name would appear on City Hall, public swimming pools and other buildings.

[Handwritten Statement And Caption Omitted In Printing]

The man who eventually helped implicate Frank – Melvin W. Dir – was a brash member of the gay community, "gay as pink ink," recalled one acquaintance. The son of a well digger, Dir was born in Boise in 1926. He graduated from Boise High and after a couple years in college, then two Navy hitches, returned to Boise in 1952.

One hot summer night a year later, Dir would climb into his car and go for a ride around town. His life, and that of the Jones family, would never be the same again.

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By now, Frank was 17 and had every reason to be on top of the world. He'd been accepted by the nation's premier military academy, West Point, surviving a grueling application process requiring congressional nomination, and open to only the top 5 percent of U.S. high school grads. Perched high on a hill above the Hudson River 50 miles north of New York City, the 150-year-old institution counted among its alumni Ulysses S. Grant, Douglas MacArthur, and George S. Patton Jr.

Fellow Boise High classmates were enormously proud. "It was just one of those neat things at graduation time," recalled Richard Crettol. " 'We have someone going to West Point.' I mean, wow, wow, wow."

At Boise High, Frank joined the concert and pep bands, the French Club and the drill team. And he was an officer in the school's ROTC program – an elite group who wore their uniforms to school every Friday. "It was an honor; it was a prestige-type thing," said Crettol, who was also an officer in Frank's battalion.

In a photograph taken during his senior year, a uniformed Frank beams at the camera, looking for all the world like he just stepped out of a sandbox. He has large, expressive eyes. His hair and complexion are dark, reflecting his Basque heritage, and he has a stocky build, perhaps from his father's side.

"He was just a marvelous guy," recalled Terteling, the City Council member.

Frank had a seemingly inexhaustible sense of humor – a trait he kept throughout most of his adult life, friends said. And he liked to be at the center of action. "He kind of made things happen," Crettol said.

Frank left for West Point around June 1955, shortly after graduation.

He wouldn't be there long, however.

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Not unlike today, Boise in the '50s was a homogeneous, insular community – a state capital with just 34,000 residents, many working for government or in the service industry.

Alice Dieter arrived in 1955 with her husband, after friends in Denver sang the city's praises. The Dieters were among two dozen families transferred by Mountain Bell Telephone Co. So unusual was that sort of influx that The Statesman devoted an entire page, with photographs, to the event.

"That was a big deal," she said.

People lived mostly north of the Boise River, in and around the North and East ends. The movers and shakers worked downtown, lunched at the Arid Club, and returned in the evening to their hostess wives in Tudor and Georgian-style mansions set on broad green lawns along Harrison Boulevard and what was simply called "The Avenue" – "you didn't even have to say 'Warm Springs,'" recalled one woman.

Downtown was still the city's commercial heart in the fall of '55. Fireplace screens were on sale at C.C. Anderson's Department Store. Disney's "Music Land" was playing at the Egyptian on Main. Rock 'n' roll hadn't conquered the airwaves yet; the McGuire Sisters' "Sincerely" was near the top of the charts. Dwight and Mamie were in the White House.

"I don't think it ever was just a small Western town in that sense of the word," Dieter said. "It was comfortable with itself and its mores and its structure. There was that kind of smugness about it."

This was a time when no one talked about sex, much less homosexuality, said the woman whose brother was arrested. "If anyone had said the word 'penis,' 15 women would have fainted."

And it was just that atmosphere that left so many unprepared for the gathering storm. "It was really a remarkable shocker," said Wally Pond, one of Frank's classmates.

* * *

The scandal began in earnest late on Halloween Night with the arrests of three men: a 29-year-old dock worker, a 33-year-old shoe store employee, and a 51-year-old clothing store clerk. Two were charged with lewd and lascivious conduct with children under 16, the third with infamous crimes against nature.

The arrests, disclosed on the front page of The Statesman, said the three had given tape-recorded confessions to "immoral acts" with at least 10 teenage boys. Even more alarming, the newspaper said a partial investigation showed several other adults and about 100 boys were involved in other, similar activities, and more arrests were expected.

An editorial under the headline "Crush the Monster" demanded action: "Disclosure that the evils of moral perversion prevail in Boise on an extensive scale must come as a distinct and intensely disagreeable shock to most Boiseans.

Time magazine picked up the story, as did newspapers all along the West Coast, and the impression developed quickly that Boise harbored a vast underground network of wealthy businessmen corrupting boys by paying them for sex.

Under such pressure, and continuing news coverage of every arrest, Ada County Prosecutor Blaine F. Evans pushed ahead.

A private investigator who rooted out gays in the U.S. State Department during the McCarthy era was hired. Working out of a rented home in the North End, he began compiling lists of suspected homosexuals, then interrogated them one at a time, asking for other names. At one point, Mayor Russell E. Edlefsen said 1,472 people had been interviewed.

By December, six months after Frank had gone to West Point, and unaware of what was about to happen to his own son – Buck and the three other City Council members called for special measures to deal with "the homosexual problem," including a separate prison or jailhouse so that those arrested could receive psychiatric treatment.

They were especially critical of the job law enforcement had been doing up to that point – an assertion that came back to haunt Buck in ways he could never have imagined.

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As word spread of the growing scandal and the first round of sentences, gay men – Mel Dir estimated hundreds – began to flee the area in droves.

Dir went to San Francisco, where he worked as a food checker at the Mark Hopkins Hotel. "I didn't try to hide where I'd gone," he told Katz, the historian, in 1973. "I was writing to people, and talking to people from Boise, and keeping track of what was going on. It was in every paper on the Coast; you could see it on the front page wherever you went."

Someone – apparently one of the men previously convicted – ratted on Dir. On the last day of 1955, he was charged with the infamous crime against nature – a felony – and specifically for performing oral sex on another male. His name: Frank Jones.

Days later, Ada County Sheriff C.L. "Doc" House and his wife drove to San Francisco to present Dir with the charge. The three of them returned to Boise, where Frank's fate was soon sealed.

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At the North End house, the investigators played a tape recording – apparently made at West Point – in which Frank said Dir had forced him to have sex at gun point.

Dir denied Frank's allegations and, in a hand-written statement, told his version of what happened that hot July evening more than two years before.

At the time, the summer of 1953, Frank was nearly 16, and about to enter his junior year at Boise High. Dir was nearly 27.

He claimed he first met Frank with a group of his friends, boys and girls, and offered them all a ride home. Frank didn't want to go right away, however, "because he seldom got a chance to stay out late," Dir said.

The two drove down Warm Springs Avenue, eventually parking at the site of the old Natatorium swimming park. The conversation got around to a man named Benny Cassel – who eventually would be sentenced to 10 years in prison during the investigations – and Frank said he understood that Dir knew him.

"I said 'yes,'" Dir replied. "He said 'How well?' I said, 'well enough.' He said, well you must like to have sex then if you know Benny, so we had a mutual oral copulation."

Afterward, they talked about sexual liaisons Frank had had with a high school classmate and with a cousin – both of whom Frank identified by name, according to Dir. And he spoke of homosexual activities that had taken place at Boy Scout camp – ironically, Buck's favorite youth cause.

Dir said he and Frank met, by chance, twice again after that night, and both times engaged in sex.

Finally, so there'd be no doubt about who Frank was, Dir told the investigators: "I wish to state he is the son of Harold T. 'Buck' Jones."

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Frank was summarily thrown out of West Point, apparently that spring.

Sheriff House had traveled to the academy and told the boy about what the authorities knew, tipping off school administrators in the process. Frank was told he'd have to come back to Boise to testify at Dir's trial. Author John Gerassi, who wrote about the scandal in his 1966 book "The Boys of Boise," said it was a calculated move to embarrass Buck – paying him back for criticizing the cops.

Dir was never tried, however, so Frank wasn't able to confirm or deny his account in court. Dir pleaded guilty, throwing himself on Judge Young's mercy. He had reason to worry; Young had sentenced one of the earlier defendants to life in prison.

But Young sentenced Dir to a five-year, withheld sentence, put him on probation, and ordered him to spend six months in the county jail.

Buck and Juanita were stunned at Frank's involvement, and the consequences, recalled family friend John Corlett. "They were deeply, deeply upset. They just had no idea about Frank . . . and they did not believe it."

In the only known interview Buck gave on the subject – with Gerassi, albeit one in which his identity was disguised – the councilman was nearly in tears.

'"It was a political witch hunt,'" Buck was quoted as saying. "'What they did to my kid was disgusting. They didn't tell me a thing. He was in West Point and in their investigation they found out that he had had a homosexual experience four years [actually three] earlier. They could have told me about it, and I would have had him brought home on an emergency leave and then we could have gone into the whole thing."

Buck wouldn't say why he and the council pushed so hard for the investigations in the first place. "'My son has made another career,'" Buck said. "'He's all right now. Let's leave him alone.'"

It wasn't entirely clear, however, that Frank was all right.

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In 1957, Frank married Sharon Bidiman, who had been one year behind him at Boise High, and at some point they adopted two children.

They eventually relocated to Portland, where Frank worked in sales for Pennsalt Corp., a chemicals concern. It was the start of a nearly 20-year exodus from Boise.

Frank earned his bachelor's in science from Portland State University, a small institution that was a far cry from West Point. He seemed to take the changed circumstances in stride, however. "I never knew Frank to cry over spilled milk," Crettol said.

Friends don't remember Frank ever referring to West Point or the events of 1955-56; most were surprised to hear about them. "Frank didn't have those tendencies," Crettol said, sounding uncomfortable with the topic of his former buddy's sexuality.

Frank worked for Pennsalt for about 15 years, in Portland and then Philadelphia, eventually getting promoted to brand manager. "He was a consummate salesman, wheeler-dealer type," recalled a co-worker. "He really liked to be where there was lots and lots of action."

By all accounts, he seemed happy – "always moving around, always laughing, always joking." That outwardly jovial nature left friends jolted by his suicide. "It was just hard to believe," said one.

By 1979, and living in St. Louis, Frank and Sharon's marriage was in trouble. Sharon filed for divorce, although her petition was dropped by the court when she didn't pursue it. They relocated to Boise later that year, but separated soon after.

Frank suffered from depression, and family members told the police he was an alcoholic, and indicated he was under a doctor's care. The once-handsome boy was 70 pounds overweight, balding, and wore glasses and a beard.

In November 1981, he took an overdose of pills in an unsuccessful suicide attempt. On Feb. 15, 1982 – a rainy Monday at about 9 p.m., and dressed in a blue windbreaker and carrying a briefcase – he eased his aging Ford sedan into the parking lot of the Rodeway Inn, less than a mile from his West Boise apartment. An hour later, he was dead, at 44.

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When the dust settled at the end of the yearlong Boys of Boise inquiry, the city concluded it didn't have a disproportionate number of gay men after all. A handful of men had indeed been having sex with boys, but some of the kids had criminal backgrounds – including one who murdered his father midway through the investigations. And there'd never been an organized homosexual ring.

Dir eventually served 18 months at the old State Penitentiary, for having consensual sex with fellow inmates at the county jail while serving time for the case in which Frank was involved. Dir, who turned 69 last month, declined to be interviewed, citing concerns about his safety.

Both Thomas and his predecessor, Evans, still practice law. Thomas eventually was elected president of the American Bar Association, a position he held in 1986-87. Evans declined an interview request.

Young became a U.S. bankruptcy judge, then retired in 1984, when he was 65.

Buck died of heart failure, at 86, on the eighth anniversary of Frank's suicide. Juanita died three years later, at 84.

Frank rests in Morris Hill Cemetery, within the cool shadow a large oak tree. Buck's cremated remains were buried on his grave for a time, briefly uniting father and son after so much turmoil. But Buck's ashes were later removed and reburied on the other side of the cemetery, beside Juanita's.

Frank is alone again.

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Why Frank killed himself may never be answered. He didn't leave a suicide note, and those presumably closest to him at the end – his sister, widow and children – declined to be interviewed.

What killed Frank is a more complex question, taking in possibilities that go far beyond the strictly medical means employed by a coroner. Was it the long arm of a community's fear? Revenge? Shame?

Without a doubt, Frank's life changed dramatically when scandal cost him his West Point degree, sending his life skittering in a far different direction.

And how did the city fare?

"It probably brought Boise into the current times faster than a small community might have otherwise been brought up to speed on," said Wayne Kidwell, a former Ada County prosecuting attorney critical of the investigations.

"It's a better place," said Thomas, "by virtue of the fact that law enforcement responded in its highest tradition, and did it effectively. It's a worse place in that this awful pattern of crime against children had become part of Boise."

The former prosecutor said every effort was made to protect Frank and the other juveniles. Inevitably, however, some were hurt, Thomas said. "You know as well as I do that, practically, life is cruel at times."

Frank and his family were among those hurt.

"It's awesome to me to think that the repercussions to that occurrence are still being felt," Councilwoman Terteling said. "Like a rock in a pond; the ripples go on and on."

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"There is cultural trickling out, that it might be OK to be gay."

Initiative revises 'Boys' rhetoric

Some fear another morals battle ahead

By Jim Hopkins
The Idaho Statesman

The renewed battle over gay rights had led to warnings that Idaho is ripe for a repeat of the abuses seen during the Boise morals investigations 40 years ago.

Observers point to the "Family and Child Protection Act" initiative, which would limit the rights of homosexuals in Idaho, and which supporters want on the November 1996 ballot. A similar initiative was narrowly rejected by voters last year.

The new measure, which calls for the "protection of Idaho's families and young children," employs some of the rhetoric and imagery used during the "Boys of Boise" scandal of 1955-56. When the proposal was unveiled in June, for example, its authors used as a backdrop the public restrooms at Ann Morrison Park – a location similar to one targeted by investigators tracking down homosexuals during the '50s.

"If you did a little digging into what people are really thinking," said researcher Jonathan Katz, an expert on gay and lesbian history, "I think you would find the same kind of hatred – irrational hatred and fear of people who are different from them."

The leader of the initiative effort, Kelly Walton, rejects that notion, however, saying his campaign isn't a witch hunt because it doesn't target individual homosexuals. "I've never accused or slandered anyone," he said.

Walton, who is 39 and said he knows little about the original Boise case, added: "It's very interesting that society would react so swiftly and strictly back in the '50s, and now it seems like political correctness wants to celebrate sexual perversion. We've come a long way in 40 years."

The same laws protecting children from sexual abuse, and criminalizing certain sexual acts between consenting adults, remain on the books today. But observers say they wouldn't be used as a springboard for a witch hunt because Boise is a far different place now.

Like many other largely suburban and rural areas, the city is home to gays and lesbians who perhaps a decade ago wouldn't have considered living outside the urban fast lane that's traditionally attracted homosexuals.

"There is cultural trickling out, that it might be OK to be gay," said Sue Hyde, a field organizer for the National Lesbian and Gay Task Force, a leading gay rights group.

Hyde and other experts say many of the things that caused middle-class, big-city flight – fear of violence, economic decline, an increasingly older population fed up with taxes – explain the growing number of gays choosing to live in cities like Boise.

There aren't any widely accepted statistics to support this view of Gay America's suburbanization. Instead, the evidence of increasing numbers and acceptance is anecdotal.

Boise groups, for example, have sponsored an annual gay pride parade through downtown that would have been unthinkable 40 years ago. The first year, 1990, the event drew 300 participants; this past summer there were about 950.

And The Idaho Statesman, which in 1955 held a distinctly anti-gay editorial stance, last year was a vocal opponent of legislation widely viewed as anti-gay.

The city's official relationship with its gay residents remains at least uneasy, however.

Mayor Brent Coles, who was 3 years old and living in Idaho Falls in 1955, spoke of Boise's "civility and tolerance" when asked if gay people were welcome in the city. "No special rights, but no lack of civil rights for any population, including gays," he said, hastening to add: "We do not tolerate child abuse."

[Transcript of Statement of Melvin Dir]

Date Jan 7, 1956

I, Melvin W. Dir, [illegible] of my own free will and without duress, promise of reward or leniency in any manner whatsoever, to Blaine Evans knowing that ___ Police Officers of the [illegible] Department, Boise, Idaho and knowing that whatever I now say can and may be used against me now or at a later time in court. I have been advised of my rights to council.

I, Melvin W. Dir, make the following statement:

I first met Frank Jones the summer of 1953 and a group of his friends, boys & girls, and offered to drive them all home. When I got Frank to his home he did not want to get out. He said he wanted to drive around for awhile because he very seldom got a chance to stay out late. So we drove out Warm Springs and eventually parked down around by the old Natatorium. The conversation got around to Benny Cassel and Frank said he understood I knew him. I said "yes." He said "How well." I said "well enough." He said well you must like to have sex then if you know Benny so we had a mutual oral copulation. He went down on me first then I went down on him. Afterwards we talked about gay affairs that he had had with Gary Mills and his cousin Fred Uranga. And how much "coming's on" went on at Scout Camp.

I wish to state he is the son of Harold T. "Buck" Jones.

After the first incident I accidentally ran into Frank twice and we went for drives and had mutual masturbation.

[MWD] [MWD]

I, Melvin W. Dir [MWD], have read the above statement, consisting of (1) ~~typewritten~~ pages, and I know the same to be a true statement as given by me. I have initialed all mistakes noticed by me.

Witnessed by: Signed by:

/s/ Earnest G. [Illegible] /s/ Melvin W. Dir

/s/ Clarence H. Bryant

MEL DIR'S STATEMENT IMPLICATING FRANK JONES WAS SIGNED IN JANUARY 1956. IN THE SECOND-TO-LAST PARAGRAPH, HE NOTED THAT FRANK WAS THE SON OF CITY COUNCILMAN HAROLD T. 'BUCK' JONES.

[Transcript of Statesman Editorial]

FROM THE EDITOR

'Boys of Boise' saga may help someone today do the right thing

[Picture And Caption Omitted In Printing]

We published a very difficult, sensitive story last week.

We intended it as a cautionary tale for times when emotions lead to hysteria, when the great commonsense center of our society is overwhelmed by the fringe.

The story is the one about Frank Jones, a prodigal son of long-lost Boise, who got chewed up in the anti-gay hysteria of the 1950s called "The Boys of Boise."

It was a pretty sorry period in the city's history, a time when rumors and suspicions spread that Boise was the center of huge ring of men preying on young boys. Nearly all of it was hogwash.

As it always does, the cleansing crusade got wrapped up in virtue. Prosecutors said they were simply enforcing a law that most of us commend: Taking advantage of children is wrong and is rightfully punishable regardless of sexual orientation.

We all applaud this law, when in the hands of prosecutors and judges thoughtfully sifting hard evidence of individual guilt. But a widespread ring of men preying on boys? It just didn't exist.

As it always does, the hysteria eventually subsided.

Also, as it always does, the desperate pain of those accused, or simply rumored about, lingered and lingered.

Frank Jones, a West Point cadet, withdrew from the academy, went on to marry and to have children, and then to commit suicide.

The story generated a number of calls at The Statesman.

No one said we got anything wrong, but most said they simply did not want to read about that painful period again for any reason. Nearly everyone expressed sympathy for the surviving members of the Jones family.

It is that group that I am most sorry for.

I thought a lot about them before we published. But, in the painful tradition of hard choices that editors face, I concluded that there was a potential public good that justified the understandable anguish we caused this family.

These decisions aren't easy. Like publishing the details of an adolescent suicide in a warning story to parents, or the age-old story of a lynching victim in a civil rights story, you weigh the pain you know you are about to cause against the good you might do.

In this case, my hope is very specific.

I hope that by reading this story, and by understanding the pain that hysterical undertakings can cause, residents of Idaho will turn their backs on a second attempt to pass an antigay constitutional proposition.

This hope is not born of an academic or speculative concern.

The voters turned their backs on Proposition One in 1994. Now backers are seeking signatures to get it on the ballot in November 1996.

Even if, as it now seems likely, the United States Supreme Court will throw out all such rubbish, the mood of our democracy can turn ugly.

Efforts such as the one underway paint that ugliness.

As painful as it is to remember, Frank Jones shouldn't be forgotten.

And if our story causes one person to refuse the pen of the petitioner, then his legacy is validated.

John Costa is the executive editor of The Idaho Statesman.

[Pages 9, 16, and 17 of Respondent Statesman's Responses to Plaintiff's Discovery Requests, R 00090, 00097, 00098]

* * *

REQUESTS FOR PRODUCTION NO. 6: Please produce the editorial page of the Sunday, October 22, 1995 edition of the Idaho Statesman newspaper.

RESPONSE: The *Statesman* objects to this Request for Production as unduly burdensome and harassing to the extent it seeks information equally available to both parties and, on information and belief, is already in the possession of Mr. Uranga. Subject to and without prejudice to or waiver of the foregoing objection, the *Statesman* responds: a copy of the October 22, 1995 editorial page content will be produced.

REQUESTS FOR PRODUCTION NO. 7: Please produce all documents and things the Statesman sent to Fred Uranga or received from Fred Uranga that relate to the Article.

RESPONSE: The *Statesman* objects to this Request for Production as unduly burdensome and harassing to the extent it seeks information already in the possession of Mr. Uranga, as exemplified by his response to Defendant's First Request for Production No. 1. Subject to and without prejudice to or waiver of the foregoing objection, the *Statesman* responds: the *Statesman* only has those documents produced by Mr. Uranga in this lawsuit.

INTERROGATORY NO. 18: Please state the reason for your deletion of Fred Uranga's name from the passage in the second column of page 9A of the Article relating to Frank Dir's handwritten statement.

ANSWER: The *Statesman* objects to this Interrogatory as vague and confusing and to the extent it assumes facts not in evidence that Mr. Uranga's name was included, at any time, in the text of the October 15, 1995 article entitled "The Boy Most Likely" and, thereafter, deleted. Subject to and without prejudice to or waiver of such objections the *Statesman* responds: Mr. Uranga's name was never deleted from the text of the article at issue because it was never included in the article.

INTERROGATORY NO. 19: Please state whether said deletion referred to in the foregoing Interrogatory No. 18 was made as a matter of any policy, guideline, or professional standard adhered to by the Statesman; and, if so, please state the standard and source, if any.

* * *

ANSWER: Mr. Costa (see Answer to Interrogatory No. 1) was the Executive Editor of the *Statesman* as of October 15, 1995, and had responsibility for keeping track of Mr. Hopkins' progress in researching and writing "The Boys of Boise" and reviewing and editing the article prior to its publication; Ms. Williams (see Answer to Interrogatory No. 1) was the assistant Managing Editor of the *Statesman* as of October 15, 1995, and had responsibility for establishing a production schedule with Mr. Hopkins and keeping track of Mr. Hopkins' progress in researching and writing "The Boys of Boise," and reviewing and editing the article prior to its publication; Mr. Hopkins (see Answer to Interrogatory No. 1) was the Special Projects Editor at the *Statesman* as of October 15, 1995, and had responsibility for researching and writing "The Boys of Boise"; Ms. Anderson (see Answer to Interrogatory No. 1) was the news editor of the *Statesman* as of October

15, 1995, and had responsibility for reviewing and editing "The Boys of Boise" prior to its publication; and Mr. Stoddard (see Answer to Interrogatory No. 1) was a designer at the *Statesman* as of October 15, 1995, and had responsibility for designing the layout of "The Boys of Boise."

REQUEST FOR ADMISSIONS

REQUEST FOR ADMISSION NO. 1: Please admit that the Statesman knowingly and intentionally published a photographic copy of the full text of Melvin Dir's handwritten statement in the Article without deleting Fred Uranga's name from the text.

RESPONSE: The *Statesman* admits that it knowingly and intentionally published a photographic copy of the full text of Melvin Dir's handwritten affidavit without making any deletions changes or edits.

REQUEST FOR ADMISSION NO. 2: Please admit that the Statesman knowingly and intentionally determined not to delete Fred Uranga's name from the photographic copy of Frank Dir's handwritten statement published in the Article.

RESPONSE: Denied.

REQUEST FOR ADMISSION NO. 3: Please admit that the Statesman negligently failed to delete Fred Uranga's name from the photographic copy of Frank Dir's handwritten statement published in the Article.

RESPONSE: Denied.

REQUEST FOR ADMISSION NO. 4: Please admit that the Statesman intentionally omitted Fred Uranga's name from the text of the Article in the second column on page 9A discussing Frank Dir's handwritten statement.

RESPONSE: Denied.

REQUEST FOR ADMISSION NO. 5: Please admit that the omission of Fred Uranga's name referred to in the foregoing Request No. 4 was done in order to comply with a Statesman policy, a Statesman or other journalistic standard, or a decision of the Statesman's editorial board or other authority within the Statesman.

RESPONSE: Denied.

REQUEST FOR ADMISSION NO. 6: Please admit that the identification of Fred Uranga by name in the Article did not enhance the newsworthiness or purpose of the Article.

RESPONSE: The *Statesman* objects to this Request for Admission to the extent it assumes facts not in evidence that Mr. Uranga's name was published in the text of the article. Subject to and without prejudice to or waiver of such objection, the *Statesman* responds: denied.

REQUEST FOR ADMISSION NO. 7: Please admit that editor John Costa's article on the editorial page (page 16A) of the Sunday, October 22, 1995 edition of the Idaho Statesman newspaper accurately describes the Statesman's position regarding the newsworthiness and purpose of the Article.

RESPONSE: Admitted.

REQUEST FOR ADMISSION NO. 8: Please admit that Statesman Special Projects Editor Jim Hopkins contacted Fred Uranga by telephone during the week of

August 28 to September 2, 1995 as part of Hopkins' preparation for the publication of the Article.